CORRECTED COPY

Pages 38 & 76

Supreme Court, U. S.
FILED
NOV 3 1975
MICHAEL RODAK, JR., CLERK

Nos. 75-436 and 75-437

In the Supreme Court of the United States

October Term, 1975

James L. Buckley, et al., appellants

v.

Francis R. Valeo, et al.

On appeals from the United States Court of Appeals for the District of Columbia Circuit and the United States District Court for the District of Columbia

BRIEF FOR THE ATTORNEY GENERAL AND THE FEDERAL ELECTION COMMISSION

EDWARD H. LEVI,
Attorney General,
ROBERT H. BORK,
Solicitor General,
DANIEL M. FRIEDMAN,
Deputy Solicitor General,
LOUIS F. CLAIBORNE,
Special Assistant to the Solicitor General,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statutes involved	4
Statement	5
A. The challenged legislation	5
1. Recordkeeping and disclosure	5
2. Limitations on contributions	6
3. Expenditure ceilings	7
4. Public financing of Presidential elections	9
B. The proceedings below	11
Argument	13
Introduction and summary	13
I. The legislation is responsive to legitimate and compelling governmental concerns	17
A. Legitimacy of the objectives	18
1. Money corruption of candidates and elected officials	18
2. Public confidence in elected government	21
3. More democratic elections	23
B. The appropriateness of the means	27
1. Recordkeeping and disclosure requirements	29
2. Ceiling on contributions	32
3. Ceiling on expenditures	35
4. Public financing of Presidential elections	36

595-040—75——1

Argument—Continued
Introduction and summary—Continued
II. The legislation does not impermissibly trench on First Amendment rights—— Page 37
A. The disclosure requirements—— 37
1. The right to speak or write anonymously—— 38
2. The right of associational privacy—— 42
B. Ceilings on expenditures—— 47
1. The principle of spending ceilings—— 47
2. Overall limitations on candidate expenditures— 52
3. The ceiling on independent expenditures—— 54
C. Appellants' other First Amendment challenges—— 56
1. Preliminary comments—— 56
2. Contribution ceilings and freedom of speech—— 60
3. Public financing and the First Amendment—— 63
4. Vagueness—— 67
III. The legislation does not invidiously discriminate against challengers or candidates of minor or new parties—— 69
A. The contribution and expenditure ceilings—— 70
1. Challengers—— 71
2. Minor party and independent candidates—— 74
B. Public funding of Presidential elections—— 76
1. Eligibility provisions—— 76
2. Allocation formulae—— 81
Conclusion—— 84

CITATIONS

Cases: Page

American Civil Liberties Union v. *Jennings*, 366 F. Supp. 1041, vacated as moot *sub nom. Staats* v. *American Civil Liberties Union*, 422 U.S. 1030—— 35
American Party of Texas v. *White*, 415 U.S. 767—— 65, 77, 79, 80
Anderson v. *United States*, 417 U.S. 211——
Associated Press v. *United States*, 326 U.S. 1—— 60
Bates v. *Little Rock*, 361 U.S. 516—— 38, 44, 61
Bigelow v. *Virginia*, No. 73–1309, decided June 16, 1975—— 50, 51
Branzburg v. *Hayes*, 408 U.S. 665—— 41
Broadrick v. *Oklahoma*, 413 U.S. 601—— 51, 59
Bullock v. *Carter*, 405 U.S. 134—— 23, 65, 76, 77
Burroughs and Cannon v. *United States*, 290 U.S. 534—— 19, 27, 30, 39
Cipriano v. *City of Houma*, 395 U.S. 701—— 23
Citizen Publishing Co. v. *United States*, 394 U.S. 131—— 60
Civil Service Commission v. *Letter Carriers*, 413 U.S. 548—— 22, 28, 51, 56, 59, 68, 69
Columbia Broadcasting v. *Democratic Comm.*, 412 U.S. 94—— 50–51, 58–59, 60
Communist Party v. *Control Board*, 367 U.S. 1— 39–40, 41, 43
Cousins v. *Wigoda*, 419 U.S. 477—— 43
Federal Trade Commission v. *Colgate-Palmolive Co.*, 380 U.S. 374—— 68
Ferguson v. *Skrupa*, 372 U.S. 726—— 24
Gibson v. *Florida Legislative Comm.*, 372 U.S. 539—— 38, 44
Golden v. *Zwickler*, 394 U.S. 103—— 41
Gravel v. *United States*, 408 U.S. 606—— 51
Gray v. *Sanders*, 372 U.S. 368—— 24

Cases—Continued

	Page
Grayned v. *City of Rockford*, 408 U.S. 104	49
Grosjean v. *American Press Co.*, 297 U.S. 233	58
Harper v. *Virginia Bd. of Elections*, 383 U.S. 663	23
Hill v. *Printing Industries of the Gulf Coast*, No. 74–456, decided June 30, 1975	41
Jenness v. *Fortson*, 403 U.S. 431	77, 82, 83
Kleindienst v. *Mandel*, 408 U.S. 753	51
Kramer v. *Union School District*, 395 U.S. 621	20
Kusper v. *Pontikes*, 414 U.S. 51	43, 61
Lathrop v. *Donohue*, 367 U.S. 820	65
Lehman v. *City of Shaker Heights*, 418 U.S. 298	51, 58
Lewis Publishing Co. v. *Morgan*, 229 U.S. 288	39
Lochner v. *New York*, 198 U.S. 45	24
Louisiana v. *N.A.A.C.P.*, 366 U.S. 293	38
Lubin v. *Panish*, 415 U.S. 709	20, 23, 77
McCulloch v. *Maryland*, 4 Wheat. 316	17
Machinists v. *Street*, 367 U.S. 740	65
Miami Herald Publishing Co. v. *Tornillo*, 418 U.S. 241	50, 51, 58
Mills v. *Alabama*, 384 U.S. 214	49, 57
Moore v. *Ogilvie*, 394 U.S. 814	81
N.A.A.C.P. v. *Alabama*, 357 U.S. 449	38, 43–44, 61
N.A.A.C.P. v. *Button*, 371 U.S. 415	38, 44, 61
Nat. Broadcasting Co. v. *United States*, 319 U.S. 190	51
Near v. *Minnesota*, 283 U.S. 697	57
New York ex rel. Bryant v. *Zimmerman*, 278 U.S. 63	39
New York Times Co. v. *Sullivan*, 376 U.S. 254	50, 58, 60
New York Times Co. v. *United States*, 403 U.S. 713	50, 51
O'Brien v. *Skinner*, 414 U.S. 524	67
Oregon v. *Mitchell*, 400 U.S. 112	19, 24
Phoenix v. *Kolodziejski*, 399 U.S. 204	23

Cases—Continued

	Page
Pipefitters v. *United States*, 407 U.S. 385	20–21
Pittsburgh Press Co. v. *Human Rel. Comm'n.*, 413 U.S. 376	50, 57
Police Jury of Vermillion v. *Herbet*, 404 U.S. 807	23
Procunier v. *Martinez*, 416 U.S. 396	41
Rabinowitz v. *Kennedy*, 376 U.S. 605	39
Red Lion Broadcasting Co. v. *Federal Communications Commission*, 395 U.S. 367	52, 58, 60
Reynolds v. *Sims*, 377 U.S. 533	20, 24
Roudebush v. *Hartke*, 405 U.S. 15	19
Shelton v. *Tucker*, 364 U.S. 479	38, 40
Sheppard v. *Maxwell*, 384 U.S. 333	51
Shuttlesworth v. *Birmingham*, 394 U.S. 1417	67
Smiley v. *Holm*, 285 U.S. 355	19, 20
South Carolina v. *Katzenbach*, 383 U.S. 301	29
Stoner v. *Fortson*, 379 F. Supp. 704	31
Storer v. *Brown*, 415 U.S. 724	77
Sweezy v. *New Hampshire*, 354 U.S. 234	44
Tally v. *California*, 362 U.S. 60	38, 40, 41, 49
United States v. *Auto Workers*, 352 U.S. 567	20, 21, 22, 25, 26, 29, 31, 35, 60, 61
United States v. *Butler*, 297 U.S. 1	65
United States v. *Classic*, 313 U.S. 299	19
United States v. *C.I.O.*, 335 U.S. 106	20, 26, 35
United States v. *Darby*, 312 U.S. 100	24
United States v. *Finance Committee to Re-elect President*, 507 F. 2d 1194	31
United States v. *Harriss*, 347 U.S. 612	30, 39
United States v. *Nixon*, 418 U.S. 683	41
United States v. *O'Brien*, 391 U.S. 367	18
United States v. *Raines*, 362 U.S. 17	15
Viereck v. *United States*, 318 U.S. 236	39
Wesberry v. *Sanders*, 376 U.S. 1	19–20, 24

Cases—Continued Page
West Coast Hotel Co. v. *Parrish*, 300 U.S. 379 24
Williams v. *Rhodes*, 393 U.S. 23 20, 77, 82
Yarbrough, Ex parte, 110 U.S. 651 19, 20
Yick Wo v. *Hopkins*, 118 U.S. 356 19
U.S. Constitution:
Article I, Section 4 19
Article I, Section 8, clause 1 4, 65
Article I, Section 8, clause 18 19
First Amendment *passim*
Fourth Amendment 3
Fifth Amendment 3, 4, 63, 67, 79
Ninth Amendment 3, 4
Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*:
47 U.S.C. 201–223 64
47 U.S.C. 315 59
47 U.S.C. 315(a) 58
47 U.S.C. 317 40
47 U.S.C. 326 67
47 U.S.C. 390–399 64
47 U.S.C. 398 67
47 U.S.C. (Supp. III) 399(a) 51, 58
Federal Election Campaign Act of 1971, P.L. 92–225, 86 Stat. 3, 2 U.S.C. (Supp. III) 431 et seq., as amended by the Federal Election Campaign Act Amendments of 1974, P.L. 93–443, 88 Stat. 1263 4, 31, 35
2 U.S.C. 431(e)(1)(A) 45
2 U.S.C. 431(f)(4)(A) 57
2 U.S.C. 431(m) 78
2 U.S.C. 432(b) 5
2 U.S.C. 432(c) 5
2 U.S.C. 432(f)(2) 5

U.S. Constitution—Continued
Federal Election Campaign Act—Continued Page
2 U.S.C. 432(f)(3) 5
2 U.S.C. 434(a)-(e) 5
2 U.S.C. 434(a)(1)(A)(i) 5–6, 30
2 U.S.C. 434(a)(1)(D) 6
2 U.S.C. 434(e) 5, 30
2 U.S.C. 437 a 3, 12, 13
2 U.S.C. 437 f 69
2 U.S.C. 437g (a)(5) 56
2 U.S.C. 437g(a)(7) 56
2 U.S.C. 437h 2, 11
2 U.S.C. 438(a)(4) 6
2 U.S.C. 438(a)(10) 68
2 U.S.C. 439b 71
18 U.S.C. 591(e) 6, 34
18 U.S.C. 591(e)(5) 63
18 U.S.C. 591(e)(5)(A) 6
18 U.S.C. 591(e)(5)(B)-(D) 6
18 U.S.C. 591(f)(4) 63
18 U.S.C. 591(f)(4)(A) 57
18 U.S.C. 591(f)(4)(H) 7
18 U.S.C. 591(i) 78
18 U.S.C. 608(a) 8, 36, 52
18 U.S.C. 608(b)(1) 6, 34
18 U.S.C. 608(b)(2) 6, 34, 62
18 U.S.C. 608(b)(3) 6, 34
18 U.S.C. 608(b)(4)(A) 34
18 U.S.C. 608(b)(5) 6
18 U.S.C. 608(b)(6) 34
18 U.S.C. 608(c) 52
18 U.S.C. 608(c)(1)(A)-(B) 7

U.S. Constitution—Continued
Federal Election Campaign Act—Continued Page
18 U.S.C. 608(c)(1)(C)-(D) 7
18 U.S.C. 608(c)(1)(E) 7
18 U.S.C. 608(d) 7
18 U.S.C. 608(e) 8, 35, 55, 59, 63
18 U.S.C. 608(e)-(f) 8
18 U.S.C. 608(f) 52, 63
18 U.S.C. 608(f)(2) 8
18 U.S.C. 608(f)(3)(A) 8
18 U.S.C. 608(f)(3)(B) 8
18 U.S.C. 612 40
Hatch Act, 5 U.S.C. 7324(a) 28, 67
Internal Revenue Code of 1954 (Subtitle H):
Presidential Election Campaign Fund Act, P.L. 92–178, 85 Stat. 562, 26 U.S.C. (Supp. III) 9001 *et seq.*, as amended by 88 Stat. 1291 *et seq.*:
26 U.S.C. 9002(2)(B) 10, 81
26 U.S.C. 9002(6) 8, 80
26 U.S.C. 9002(7) 8, 79, 80
26 U.S.C. 9003(b)-(c) 9
26 U.S.C. 9004(a) 10
26 U.S.C. 9004(a)(1) 80
26 U.S.C. 9004(a)(1)-(2) 10
26 U.S.C. 9004(a)(2)(A) 80
26 U.S.C. 9004(a)(2)(B) 4, 80
26 U.S.C. 9004(a)(3) 10, 80
26 U.S.C. 9004(b)-(c) 9
26 U.S.C. 9006 9
26 U.S.C. 9006(d) 9
26 U.S.C. 9007(b) 9
26 U.S.C. 9008(a) 9
26 U.S.C. 9008(b) 79
26 U.S.C. 9008(b)-(c) 10

U.S. Constitution—Continued
Internal Revenue Code of 1954—Continued
Presidential Election Campaign—Cont. Page
26 U.S.C. 9008(b)(1) 8
26 U.S.C. 9008(b)(2) 8
26 U.S.C. 9008(c) 9
26 U.S.C. 9008(d) 8
26 U.S.C. 9008(d)(1) 8
26 U.S.C. 9008(d)(2) 8
26 U.S.C. 9008(d)(3) 8
26 U.S.C. 9008(h) 9
26 U.S.C. 9011(b)(2) 2
Presidential Primary Matching Payment Account Act, as added by 88 Stat. 1297 *et seq.*:
26 U.S.C. 9031 79
26 U.S.C. 9032(7) 79
26 U.S.C. 9033(b) 9, 10
26 U.S.C. 9033(b)(2) 78
26 U.S.C. 9034(a) 10
26 U.S.C. 9034(b) 9, 10, 77
26 U.S.C. 9037(a) 77
26 U.S.C. 9037(b) 77
26 U.S.C. 9037(g) 9
26 U.S.C. 9038(b) 9
26 U.S.C. 9040–9041 2
34 Stat. 864 20
36 Stat. 822 20
37 Stat. 25 20
43 Stat. 1070 20
54 Stat. 767 20
57 Stat. 163 20
61 Stat. 136 20
15 U.S.C. 1801–1804 64
26 U.S.C. 6096 9
28 U.S.C. 2282 2

Miscellaneous:	Page
39 C.F.R. 132.2	64
120 Cong. Rec. H10330 (daily ed., Oct. 10, 1974)	57
Developments in the Law—Elections, 88 Harv. L. Rev. 1111 (1975)	31, 40
40 Fed. Reg. 26660–26666	69
40 Fed. Reg. 28044–28045	69
40 Fed. Reg. 28944–28945	69
40 Fed. Reg. 29792–29794	69
40 Fed. Reg. 29793–29794	45
40 Fed. Reg. 30258–30259	69
40 Fed. Reg. 31315–31317	69
40 Fed. Reg. 34084–34085	69
40 Fed. Reg. 36092–36094	69
40 Fed. Reg. 36242–36243	69
40 Fed. Reg. 36746–36747	69
40 Fed. Reg. 40673–40675	69
40 Fed. Reg. 42838–42840	69
40 Fed. Reg. 44040	69
40 Fed. Reg. 45292–45293, 45295–45296	69
40 Fed. Reg. 47691	69
Felix Frankfurter Reminisces (*Anchor* 1962)	61
H.R. Rep. No. 93–1239, 93d Cong., 2d Sess. (1974)	21, 57
S. Rep. No. 93–689, 93d Cong., 2d Sess. (1974)	21

In the Supreme Court of the United States

OCTOBER TERM, 1975

NOS. 75–436 AND 75–437

JAMES L. BUCKLEY, ET AL., APPELLANTS

v.

FRANCIS R. VALEO, ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE ATTORNEY GENERAL AND THE FEDERAL ELECTION COMMISSION [1]

OPINION BELOW

The opinions of the court of appeals (J.S. App. 1505–1623 [2]), adopted in relevant part by the three-judge court (J.S. App. No. 75–437, 1a), is reported at 519 F.2d 821.

[1] The Attorney General joins this brief as a party. The Attorney General has also joined as a party in the separate brief for the United States to the extent that brief discusses the law enforcement and interpretive rule-making powers of the Federal Election Commission. The Attorney General is participating as counsel on both this brief and the separate brief for the United States.

[2] Unless otherwise noted, "J.S." refers to the jurisdictional statement in No. 75–436.

JURISDICTION

The judgment of the court of appeals with respect to the whole case (J.S. App. 1582–1586) and the judgment of the three-judge district court with respect to the issues arising under Chapters 95 and 96 of the Internal Revenue Code (J.S. App. No. 75–437, 1a–5a) were both entered on August 15, 1975. Notices of appeal to this Court were filed on August 21, 1975. Probable jurisdiction was noted on October 6, 1975. The jurisdiction of this Court to entertain the appeal from the judgment of the court of appeals rests on 2 U.S.C. 437h(b). The jurisdiction of this Court to entertain the appeal from the judgment of the three-judge district court rests on 26 U.S.C. 9011(b)(2) and 28 U.S.C. 1253. *Civil Service Commission* v. *Letter Carriers,* 413 U.S. 548.[3]

QUESTIONS PRESENTED

In accordance with 2 U.S.C. 437h and the order of the court of appeals (J. App. 74–75), the district court certified 28 constitutional questions to the court of appeals (J.S. App. 1582–1586). The questions before this Court may be summarized as follows:[4]

1. Whether the particular requirements in the challenged statutes providing for recording and disclosure of the source and amount of contributions to candidates for federal elective office and expenditures by or on behalf of such candidates violate the rights of one or more of the plaintiffs under the First, Fourth, or Ninth Amendment or the Due Process Clause of the Fifth Amendment.[5]

2. Whether any statutory limitation, or the particular limitations in the challenged statutes, on the amounts that individuals or organizations may contribute in connection with elections for federal office violate the rights of one or more of the plaintiffs under the First, Fifth, or Ninth Amendment or the Due Process Clause of the Fifth Amendment of the Constitution of the United States.

3. Whether any statutory limitation, or the particular limitations in the challenged statutes, on the amounts that candidates for elected federal office may expend in their campaigns, or on the amounts that may

[3] Because it is not clear whether the reference in 2 U.S.C. 437h to "this Act" includes new Chapters 95 and 96 of the Internal Revenue Code, a three-judge district court was convened to consider the constitutional challenge to these provisions. That procedure seems to be mandated by 26 U.S.C. 9011(b)(2) with respect to Chapter 95. Although there is no comparable provision in Chapter 96 (see 26 U.S.C. 9040–9041), the same course would be required by 28 U.S.C. 2282. Out of abundance of caution, the court of appeals also ruled on the constitutional questions arising under Chapters 95 and 96. Since both courts reached identical results and this Court has jurisdiction on appeal from both judgments, we submit it is unnecessary to decide which court had jurisdiction.

[4] This brief does not address any of the issues arising out of the law enforcement powers of the Commission. With respect to those questions, the Commission is separately represented by Special Counsel, who have filed a further brief on behalf of the Federal Election Commission. The Attorney General has filed a separate brief, which is combined with the *amicus* brief of the United States (see note 1, *supra*), discussing those questions.

[5] Insofar as this question involves a challenge to 2 U.S.C. 437a, that issue has been eliminated by the decision of all defendants not to appeal the ruling below striking down that section as unconstitutional.

be expended by other persons or organizations for their benefit, violate the rights of one or more of the plaintiffs under the First or Ninth Amendment or the Due Process Clause of the Fifth Amendment.

4. Whether any statutory provision for the public financing of political conventions or campaigns for nomination or election to the Presidency or Vice Presidency, or the particular provisions for public financing in the challenged statutes, violates the rights of one or more of the plaintiffs under the First or Ninth Amendment, the Due Process Clause of the Fifth Amendment, or Article I, Section 8, clause 1, of the Constitution of the United States.

STATUTES INVOLVED

The statutes involved are the Federal Election Campaign Act of 1971, P.L. 92–225, 86 Stat. 3, 2 U.S.C. (Supp. III) 431 *et seq.;* Subtitle H of the Internal Revenue Code (Chapters 95 and 96, also known respectively as the Presidential Election Campaign Fund Act and the Presidential Primary Matching Payment Account Act), P.L. 92–178, 85 Stat. 562, as amended, 26 U.S.C. (Supp. III) 9001 *et seq.;* and the Federal Election Campaign Act Amendments of 1974, P.L. 93–443, 88 Stat. 1263. The full text of those statutes (together with other related provisions not at issue in these proceedings) is reproduced in a government pamphlet entitled "Federal Election Campaign Laws," which is reprinted in Vol. III of the joint appendix.[6]

[6] We note one obvious misprint in the pamphlet: in the fourth line of 26 U.S.C. 9004(a)(2)(B), the word "received" should be substituted for "required" (p. 64).

STATEMENT

A. THE CHALLENGED LEGISLATION

Putting aside provisions concerning the enforcement and interpetive rule-making powers of the Federal Election Commission, the legislation in suit has four principal features: (1) it requires recordkeeping and disclosure of campaign contributions and expenditures; (2) it limits the size of contributions from individuals and groups; (3) it places ceilings on expenditures by, or for the benefit of, candidates for elective federal office; and (4) it provides public financing for Presidential campaigns. We describe each of these aspects briefly, subject to further elaboration of certain points in the Argument.

1. RECORDKEEPING AND DISCLOSURE

The initial requirement is that political committees supporting candidates for federal office record, with the name of the donor, every contribution received in excess of $10 and every expenditure made, regardless of amount. 2 U.S.C. 432(c); see, also, 2 U.S.C. 432(b). Additionally, periodic reports must be filed, directly or indirectly with the Commission, which, among other things, disclose the source of every contribution exceeding $100 and the recipient and purpose of every expenditure over the same amount. 2 U.S.C. 432(f)(2)–(3), 434(a)–(e). That obligation is imposed on individuals as well as committees. 2 U.S.C. 434(e). The last pre-election reports must be complete as of two weeks before the election and must be filed not later than 10 days before the event. 2 U.S.C. 434(a)(1)

(A)(i). But any last-minute contribution of $1,000 or more must be reported within 48 hours. 2 U.S.C. 434 (a)(1). Finally, such reports are promptly made available for public inspection and copying. 2 U.S.C. 438(a)(4).

2. LIMITATIONS ON CONTRIBUTIONS

Contributions are broadly defined to include any gift or loan of money or anything else of value. 18 U.S.C. 591(e). But volunteered personal services are not included (18 U.S.C. 591(e)(5(A)); nor are certain advantages volunteered by a supporter up to a value of $500. 18 U.S.C. 591(e)(5)(B)–(D). The amount of contributions is limited as follows:

(a) A multi-candidate political committee that satisfies certain conditions may contribute up to $5,000 to any single candidate in any given primary or election; there is, however, no limit on the number of candidates who may receive such a contribution from the committee and therefore no total ceiling on the contributions of such a committee. 18 U.S.C. 608(b)(2); see also, 18 U.S.C. 608(b)(5).

(b) Other political committees or groups are limited to $1,000 in contributions per election (or primary) with respect to any particular candidate; but, again, there is no overall limit on contributions. 18 U.S.C. 608(b)(1).

(c) Individuals are likewise restricted to $1,000 per election (or primary) to any particular candidate (*ibid.*); they are, moreover, restricted to an aggregate limit of $25,000 with respect to any election period. 18 U.S.C. 608 (b)(3).

3. EXPENDITURE CEILINGS

The new law imposes limitations on spending in political campaigns. First and foremost, there are ceilings on what the candidate himself (or his principal campaign committee or other authorized representative) may spend. These are:

(a) In the case of a candidate for the Presidency, $10 million in the primary and $20 million in the general election campaign. 18 U.S.C. 608(c)(1)(A)–(B).

(b) In the case of a candidate for the Senate, or for the House of Representatives in a state which is entitled to only one Representative, the greater of $100,000 or 8 cents per voting age resident at the primary and the greater of $150,000 or 12 cents per voting age resident at the general election. 18 U.S.C. 608(c)(1)(C)–(D).

(c) In the case of any other candidate for the House of Representatives, $70,000 at the primary and the same amount at the general election. 18 U.S.C. 608(c)(1)(E).

These ceilings are subject to upward adjustment on two bases. First, up to 20 per cent, the cost of collecting contributions, is exempted from the expenditure limits. 18 U.S.C. 591(f)(4)(H). Second, the ceilings themselves are increased each year to reflect the increased costs of living. 18 U.S.C. 608(d).

There are restrictions on what a candidate may expend from his personal or family funds: $50,000 for a Presidential candidate; $35,000 for a Senatorial candidate or House candidate in a single Rep-

595-404—75——2

resentative State; $25,000 for all other House candidates. 18 U.S.C. 608(a).

Ceilings also apply with respect to the expenditures of individuals or groups acting independently and national or State political party committees in support of a candidate—none of which is counted against his allowance. 18 U.S.C. 608(e)–(f). For individuals and groups, the ceiling is $1,000 per candidate per election, with no overall limit. 18 U.S.C. 608(e). For political party committees, the limits are:

> (a) For a Presidential candidate, 2 cents multiplied by the voting age population of the country. 18 U.S.C. 608(f)(2).
>
> (b) For a candidate for the Senate, or for the House in a single Representative State, the greater of $20,000 or 2 cents per voting age resident of the State. 18 U.S.C. 608(f)(3)(A).
>
> (c) For any other House candidate, $10,000. 18 U.S.C. 608(f)(3)(B).

Finally, a ceiling is imposed on party expenditures with respect to Presidential nominating conventions. 26 U.S.C. 9008(d). The limit is $2 million for a "major party" (one whose candidate received 25 percent or more of the votes cast at the previous Presidential election, 26 U.S.C. 9002(6)). 26 U.S.C. 9008 (b)(1) and (d)(1). For a "minor party" (one whose candidate received between 5 and 25 percent of the votes cast at the last election, 26 U.S.C. 9002(7)), the limit is such portion of $2 million as the votes received by that party's candidate at the previous election bear to the average votes received by the

major party candidates at the same previous election. 26 U.S.C. 9008(b)(2) and (d)(2). In "extraordinary and unforeseen circumstances," however, the Federal Election Commission is authorized to increase these ceilings. 26 U.S.C. 9008(d)(3).

4. PUBLIC FINANCING OF PRESIDENTIAL ELECTIONS

The legislation provides that taxpayers may designate $1 of their taxes to be contributed to the Presidential Election Campaign Fund. 26 U.S.C. 6096. Three accounts are established within the Fund, one for Presidential nominating conventions (26 U.S.C. 9008(a)), one to finance the general election campaign of eligible candidates (26 U.S.C. 9006), and one out of which matching payments are made to eligible candidates during the Presidential primaries (26 U.S.C. 9037(g)). Provision is made for an equitable distribution of moneys should the Fund be insufficient to satisfy all claims. 26 U.S.C. 9006(d), 9007(b). In all cases, the subsidy must actually be spent and does not increase the applicable contributions and expenditure ceilings. 26 U.S.C. 9003 (b)–(c), 9004 (b)–(c), 9007(b), 9008(c), 9008(h), 9033(b), 9034(b), 9038(b).

Briefly, the scheme is as follows:

> (a) Any person who seeks nomination as the Presidential candidate of a political party who has received private contributions exceeding $5,000 (counting only the first $250 of each contribution) in each of 20 States is eligible for matching payments to defray his "primary"

campaign expenses. 26 U.S.C. 9033(b). Payments from the Fund match only a maximum of $250 from any private contributor. 26 U.S.C. 9034(a). The total subsidy to any candidate may not exceed $5 million. 26 U.S.C. 9034(b).

(b) The national committee of a political party whose candidate has received at least 5 percent of the votes cast at the previous Presidential election is entitled to public funds to defray the expenses of its Presidential nominating convention, up to the total spending ceilings already noted, *supra*. 26 U.S.C. 9008(b)–(c).

(c) Every candidate of a political party who has qualified for the Presidential ballot in 10 States and who, at the current election or the previous election, or whose party at the previous election, has received 5 percent of the total vote cast, is entitled to public moneys toward his general election campaign expenses. 26 U.S.C. 9002(2)(B), 9004(a).

With respect to the general election, the amount of the payment, subject to the availability of sufficient moneys in the Fund, is $20 million for a major party candidate and such portion thereof for any other eligible candidate as the votes he or his predecessor received represents when measured against the average votes for the major party candidates. 26 U.S.C. 9004(a)(1)–(2). Minor and new party candidates eligible for a grant on the basis of past performance are entitled to a further payment if they achieve a higher vote in the current election. 26 U.S.C. 9004(a)(3). These payments, like those to candidates eligible only

on the basis of current performance, are necessarily made after the election.

B. THE PROCEEDINGS BELOW

These proceedings were begun in the district court on January 2, 1975. The plaintiffs are a United States Senator (James L. Buckley), a former Senator and announced candidate for the Presidency (Eugene J. McCarthy), a Member of the House of Representatives (William A. Steiger), a substantial contributor to candidates for federal elective office (Stewart Rawlings Mott), Senator McCarthy's campaign committee (Committee for a Constitutional Presidency—McCarthy '76), three minor political parties (the Conservative Party of the State of New York, the Mississippi Republican Party, and the Libertarian Party), one chapter of a national civil liberties organization (New York Civil Liberties Union, Inc.), two political action organizations (American Conservative Union and Conservative Victory Fund), and one publication (Human Events, Inc.). All sought to enjoin the implementation of the legislation in suit as unconstitutional. J.S. App. 1508–1509.

Initially, the district judge certified the case to the court of appeals, as required by 2 U.S.C. 437h. J.S. App. 1509–1510. However, on April 14, the court of appeals, sitting *en banc*, remanded the matter to the district court with instructions to develop a record and particularize the constitutional questions presented. J.S. App. 1510, 1587. On remand, the district judge received and adopted certain proposed findings submitted by the parties. J.S. App. 1588. These are

referred to hereinafter as "Findings I, ¶ —," or "Findings II, ¶ —." J. App. 1–698. There were, in addition, a number of depositions and affidavits, which the district court summarized, "Findings III." J. App. 699–753. Finally, the court certified 28 constitutional questions. J. App. 754–760. By memorandum and order of May 19, the case was returned to the court of appeals. J. App. 1.

Pursuant to the order of the court of appeals, a three-judge district court was convened (consisting of District Judge Corcoran and two circuit judges). That court and the court of appeals *en banc,* sitting together, received briefs and heard oral argument. On August 15, 1975, both courts rendered judgments (J.S. App. 1582–1586; J.S. App. No. 75–437, 1a–5a), supported by a lengthy *per curiam* opinion of the court of appeals (J.S. App. 1505–1593), which the district court adopted in relevant part (J.S. App. No. 75–437, 1a). In effect, both courts rejected the challenges to the legislation, except with respect to 2 U.S.C. 437a, which requires disclosure by certain organizations which expend funds or do acts directed to the public for the purpose of influencing the election or advocating election or defeat of candidates, which was declared unconstitutional and its enforcement enjoined. Several questions relating to the composition and powers of the Federal Election Commission were left undecided as "not presently ripe for adjudication" (J.S. App. 1572).[7]

[7] Chief Judge Bazelon dissented only from the majority decision upholding the disclosure requirements as applied to minor parties. J.S. App. 1593–1597. Judge Tamm, joined by Judge Wilkey, would have invalidated the provisions establishing ceilings on contributions and expenditures as well as those providing for public financing of Presidential elections; his opinion also condemns the method of appointment of the Federal Election Commission. J.S. App. 1598–1609. Judge MacKinnon, while otherwise joining in the majority's decision, would have invalidated several provisions relating to the powers and composition of the Commission, most of which the majority of the court of appeals deemed not ripe for adjudication. J.S. App. 1609–1623.

None of the defendants or intervening defendants having appealed from the ruling invalidating 2 U.S.C. 437a, the case is now before this Court on the plaintiffs' appeal from the judgments sustaining the legislation in all other respects.

ARGUMENT

INTRODUCTION AND SUMMARY

1. Several preliminary remarks are appropriate in this unusual case. Appellants' lengthy brief challenges on innumerable grounds the constitutionality of virtually every provision of the Federal Election Campaign Act Amendments. In order to keep our submission within reasonable length, we have focused upon the major issues and have dealt only briefly or not at all with many of appellants' minor points which we deem insubstantial.

To a considerable extent, appellants' arguments are directed to the wisdom of the legislation rather than its constitutionality. Again and again they contend that the statute will not accomplish the objectives that Congress sought to achieve, and that other methods of

dealing with the problem of excessive campaign spending would be preferable. A recurring theme throughout their brief is that disclosure statutes would be more appropriate than the present limitations upon contributions and expenditures, the requirements for record-keeping and disclosure, and the public financing of Presidential elections.

For example, appellants state (Br. 126–127) that "disclosure of large contributions with a potential for influence * * * rather than the restriction of political communication, is the remedy that should be relied upon in a democratic nation which trusts its voters." They also state that "[t]he best solution" to the problem of contributions "is disclosure of large contributions" (Br. 144) and that "appellants believe that narrowly drawn disclosure requirements are the proper solution to virtually all the evils Congress sought to remedy by passing the challenged statutes" (Br. 171).

Appellants' brief thus in large measure consists of policy arguments why Congress should not have enacted this legislation. Many of the arguments have considerable support in the writings of political commentators and experts on government, and presumably they were vigorously and effectively made to Congress when this legislation was under consideration. Congress, however, found the arguments unconvincing, and instead adopted the procedures and techniques contained in the Federal Election Campaign Act Amendments. The constitutionality of those

Amendments is the sole question before the Court, and their validity is not undermined by the fact that there is a substantial body of opinion which believes that Congress should have utilized other methods of dealing with the problem.

The claim is that the legislation is unconstitutional on its face. Many of the specific challenges, however, are based upon speculation about the effects of the statute as applied to various situations which have not occurred and may not arise. Although the implication of First Amendment rights may justify examination of the facial validity of legislation which allegedly has a chilling effect upon the exercise of those rights, not every claim of facial invalidity need be resolved merely because it is made within the rubric of protecting First Amendment rights. "The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined" (*United States* v. *Raines,* 362 U.S. 17, 22).

As the court of appeals correctly ruled in this case and as we argue in this brief, many of appellants' attacks upon the constitutionality of the Federal Election Campaign Act are essentially premature. Since it is impossible at this time to predict how the statute will operate in numerous respects when it is actually applied to the nominating and electoral processes, a large part of appellants' constitutional attacks on the legislation is not now meet for judicial resolution.

2. With these introductory comments, we turn to a very abbreviated summary of our submission. It would unduly burden an already long brief to attempt more.

Our discussion begins (Point I, *infra,* pp. 17-37) with a consideration of the objectives which underlay the legislation. We identify three: (1) reducing electoral corruption, in the form of undue influence by financial supporters on candidates; (2) partially restoring public confidence in representative government by allaying popular suspicions that large moneyed interests control too many elected officials; and, finally, (3) increasing democracy in federal elections by widening the meaningful participation of ordinary citizens in electoral campaigns. We conclude that each of these ends is legitimate, indeed compelling. And we submit that they are furthered by the several features of the campaign reform statutes: strict record-keeping and disclosure requirements; limits on money contributions to candidates; ceilings on campaign expeditures, whether made directly by the candidate and his agents or indirectly by others for his benefit; and optional public financing of Presidential primaries, conventions and general elections.

We next examine (Point II, *infra,* pp. 37–69) the First Amendment objections interposed against the legislation. We focus primarily on the two issues that, in our view, are the major First Amendment questions presented: (1) whether the disclosure requirements impermissibly inhibit free association, and (2) whether the expenditure ceilings "cut off" free speech in violation of the Amendment. After full examination of the relevant precedents, we conclude that the impact of the legislation on the exercise of these rights is minimal and that, at all events, the impor-

tance of the governmental objectives (including the promotion of First Amendment values) outweighs any incidental adverse effect on free association and political speech.

Finally (Point III, infra, pp. 69–83), we address the claim that the new law discriminates against challengers and the candidates of minor and new parties. We consider first the effect of the contribution and expenditure ceilings and then the public financing scheme for Presidential elections. In both cases, we show that the attack is speculative in the absence of actual experience under the new provisions. Although the challenged legislation will not eliminate all the present advantages enjoyed by incumbents and by the candidates of established major parties, its probable effect will be to reduce, rather than enhance, those disparities. Accordingly, we conclude that the charge of discrimination is without foundation.

I

THE LEGISLATION IS RESPONSIVE TO LEGITIMATE AND COMPELLING GOVERNMENTAL CONCERNS

The threshold question whenever legislation is challenged on constitutional grounds is always whether, in the words of Chief Justice Marshall, "the end [is] legitimate" and the "means * * * are appropriate * * * [and] plainly adapted to that end." *McCulloch* v. *Maryland,* 4 Wheat. 316, 421. We turn first, therefore, to the congressional objectives and the mechanisms selected to implement them—leaving for later consideration the objection that the means

"are * * * prohibited." *Ibid.* While we do not now address the First Amendment claims, our discussion of the legitimacy of the congressional objectives and the appropriateness of the means selected must take into account that the legislation significantly affects First Amendment interests; we accordingly show that the legislation is responsive to a "compelling" governmental interest. See *United States* v. *O'Brien,* 391 U.S. 367, 376–377.

A. LEGITIMACY OF THE OBJECTIVES

The challenged federal election campaign laws were intended to serve at least three objectives: (1) to lessen the danger of money corruption in electoral campaigns; (2) to restore public confidence in representative government; and (3) to democratize elections by diminishing the power of wealthy interests and encouraging wider citizen participation. Each of these goals is a proper predicate for congressional action and any one is sufficient to justify the legislation. We consider them *seriatim.*

1. Money corruption of candidates and elected officials

The principal, and the most vocalized, objective of the legislation was to remove, or diminish, the risk that certain individuals or groups will "buy" or play an inordinate role in the election of selected candidates for federal office and that, once elected, these officials will be corrupted by a tie with large campaign contributions.

a. That congressional power exists to combat such an evil is not debatable. As long ago as *Ex parte Yarbrough,* 110 U.S. 651, 667, the Court expressly recognized authority to deal with "the free use of money in elections," and that *dictum* was confirmed in *Burroughs and Cannon* v. *United States,* 290 U.S. 534, sustaining the constitutionality of the Federal Corrupt Practices Act of 1925 as applied to Presidential elections. See, also, *Smiley* v. *Holm,* 285 U.S. 355, 366–367; *Roudebush* v. *Hartke,* 405 U.S. 15, 24–25. Whether the power is "implied" or "inherent" in the constitutional scheme, or derives from Article I, Section 4, of the Constitution or from the Necessary and Proper Clause of the Same Article (Section 8, clause 18), may be unclear. Compare *Ex parte Yarbrough, supra,* 110 U.S. at 658, and *Burroughs and Cannon* v. *United States, supra,* 290 U.S. at 545, with *Smiley* v. *Holm, supra,* 285 U.S. at 366–367, and *United States* v. *Classic,* 313 U.S. 299, 314–321. And see *Oregon* v. *Mitchell,* 400 U.S. 112, 119–124 (Opinion of Black, J.). But there is no doubt that Congress may legislate to this end.

Nor can it be disputed that the goal of freeing elections from the corrupting influence of money is not only a legitimate subject of legislation, but a compelling, indeed, a vital governmental concern. The importance of voting, the "fundamental political right, because preservative of all rights" (*Yick Wo* v. *Hopkins,* 118 U.S. 356, 370), has been too often restated by this Court to require elaboration here. See, *e.g., Wes-*

berry v. *Sanders,* 376 U.S. 1, 17; *Reynolds* v. *Sims,* 377 U.S. 533, 562; *Williams* v. *Rhodes,* 393 U.S. 23, 31; *Kramer* v. *Union School District,* 395 U.S. 621, 626; *Lubin* v. *Panish,* 415 U.S. 709, 714. So has the corollary, that there is a compelling governmental interest in keeping elections free from the corrupting influence of "big money." *Ex parte Yarbrough, supra; Smiley* v. *Holm, supra; United States* v. *Auto Workers,* 352 U.S. 567, 570–589.

b. So much is, we assume, unchallenged. But, say the appellants, however legitimate it might be (First Amendment objections aside) for Congress to address such an evil if it were real, there is no present danger of money corruption in federal elections, and, even if there were, the legislation is not appropriate to deal with it.

The assertion that the corrupting influence of wealthy interests is not a real threat to the electoral process and representative government insults the intelligence, and the integrity, of successive Congresses who for three quarters of a century have been wrestling with the problem. That history, which includes statutes enacted in 1907 (34 Stat. 864), 1910 (36 Stat. 822), 1911 (37 Stat. 25), 1925 (43 Stat. 1070), 1940 (54 Stat. 767), 1943 (57 Stat. 163, 167) and 1947 (61 Stat. 136, 159), is fully recited in the opinion below (J.S. App. 1511–1513, 1589–1593) and in *United States* v. *Auto Workers, supra,* 352 U.S. at 570–583. See, also, *United States* v. *C.I.O.,* 335 U.S. 106, 113–115; *Pipefitters* v. *United States,* 407 U.S.

385, 402–412. What is revealed is a continuing legislative concern with "the corroding effect of money employed in elections by aggregated power." *United States* v. *Auto Workers, supra,* 352 U.S. at 582. The Federal Election Campaign Act of 1971 and the 1974 Amendments challenged here represent merely the culmination of that long effort.

Against this background and the ample legislative history recounted in the opinion below and in *Auto Workers, supra,* it would be pointless to indulge in a debate over what informed the congressional mind when it enacted the statutes in suit. It is hardly surprising that the record is not replete with confessions of corrupt influence. There is, however, quite enough to require acceptance of the legislative judgment that, absent regulation, there would be a real risk that large contributions would corrupt both the electoral process and some of our elected officials. See, *e.g.,* H.R. Rep. No. 93–1239, 93d Cong., 2d Sess. 3 (1974); S. Rep. No. 93–689, 93d Cong., 2d Sess. 4 (1974); Findings I, ¶¶ 105, 108, 110–127, 146, 156–165; J. App. 147, 148–156, 203, 253–255. See, also, Findings I, ¶¶ 101–103; J. App. 54–146.

2. Public confidence in elected government

Appellants correctly note (Br. 63) that congressional speakers often expressed a concern about public suspicion of the improper influence of "big money," rather than actual corruption. What is demonstrated, however, is no more than that this was an additional consideration behind the enactment. And that is entirely natural. From the beginning, statutory restric-

tions on the unlimited use of money in political campaigns have responded, in part, to public suspicions and a concern to avoid the appearance of evil. Thus, this Court described the 1907 law banning most corporate political contributions as ultimately provoked by "popular feeling that aggregated capital unduly influenced politics, an influence not stopping short of corruption." *United States* v. *Auto Workers, supra,* 352 U.S. at 570. Surely, no one doubts that the electorate of today shares those views. See Findings I, ¶¶ 133, 144–151, 153–155, 171; J. App. 159–189, 192–209, 214–253, 257.

Nor is there anything improper in legislating to restore public confidence in elected government. On the contrary, that is a wholly legitimate objective, and, indeed, a critical one in times of deep public suspicion and apathy grounded in the citizens' belief that "their" representatives are often "captives" of wealthy special interests. If authority is needed to support so self-evident a proposition, we cite *Civil Service Commission* v. *Letter Carriers,* 413 U.S. 548, 565, expressly invoking congressional concern for appearances in support of the Hatch Act ban on active electioneering by government employees:

> There is another consideration in this judgment: it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent.

3. More democratic elections

Congress was also attempting, by limiting the influence of wealthy supporters, placing a ceiling on expenditures and providing public funds, to democratize federal elections. Fears of corruption aside, the objective was to lessen the disproportionate advantage, the distorting effect, of wealthy special interest groups, and to increase opportunities for meaningful participation by ordinary citizens, as voters, supporters and candidates. Appellants, it seems, both question the propriety of such a goal and doubt whether the legislation will accomplish it.

a. Assuming the congressional objective was not to "freeze" the status quo, but, rather, to open up federal elections to wider participation, is that a legitimate goal? The question would seem to answer itself. Indeed, First Amendment objections aside (see Point II, *infra*), what can be wrong under our constitutional system with an attempt to assure that access to federal elective office is made available to a greater number and the influence of supporters and contributors is made more equal? The consistent jurisprudence of the Court has approved that trend, expressly condemning restrictive rules for political participation that discriminate against the poor. *Lubin* v. *Panish, supra; Bullock* v. *Carter,* 405 U.S. 134; *Harper* v. *Virginia Bd. of Elections,* 383 U.S. 663. See, also, *Cipriano* v. *City of Houma,* 395 U.S. 701; *Phoenix* v. *Kolodziejski,* 399 U.S. 204; *Police Jury of Vermillion* v. *Herbet,* 404 U.S. 807.

595-040—75——3

To be sure, as in most things, enlarging the opportunities of the many diminishes the prerogatives of the few. But, in a constitutional system involving the egalitarian principle of "one person, one vote" (*Gray* v. *Sanders*, 372 U.S. 368, 381; *Wesberry* v. *Sanders, supra*, 376 U.S. at 7–8, 18; *Reynolds* v. *Sims, supra*, 377 U.S. at 561–568), that is no objection, so long as no one is excluded from participation. The inflated voice of large contributors, the head-start of wealthy candidates, the entrenched position of the major political parties, are not vested rights which enjoy constitutional immunity from legislative efforts to open the political arena more widely. One might as well argue that it was unconstitutional to deprive those who satisfied property or literacy qualifications for voting of their monopoly when the Constitution itself did not mandate it. Cf. *Oregon* v. *Mitchell, supra*.

At one time it would have been said that there is a difference between withdrawing an "artificial" prerogative or advantage which the state itself has conferred and interfering with the "natural" advantage that wealth carries. But that argument has been foreclosed at least since the 300th volume of the Court's Reports. See, *e.g., West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379; *United States* v. *Darby*, 312 U.S. 100; *Ferguson* v. *Skrupa*, 372 U.S. 726. To paraphrase Mr. Justice Holmes (*Lochner* v. *New York*, 198 U.S. 45, 75), the Constitution does not enact the "*laissez faire*" philosophy that exalts "rugged individualism" and the "free market" over

every other value and forbids all governmental interference to redress gross imbalance or to protect the consumer against deceit. If it were so, the antitrust laws, the pure food and drug laws, the minimum wage laws, the social security laws, the fair employment laws, and a myriad of other regulatory statutes, state and federal, not to mention the progressive income tax, would be invalid.

It will be said that cases dealing with economic regulation have nothing to do with our subject-matter. But that is, at best, only a half-truth. One of the major concerns of the present law is the influence of undue economic power upon the electoral processes. It is not irrelevant that the Court's recitation of the history of restrictions on political contributions by aggregated wealth in *United States* v. *Auto Workers, supra*, 352 U.S. at 570, begins with the antitrust laws and the progressive income tax. There are, to be sure, First Amendment inhibitions here. But, as we shall argue in Point II, *infra*, the Amendment does not preclude government action to deal with the problem that large contributors may be able to monopolize or grossly distort the political process, even absent any danger of actual corruption.

Nor is this a radical new idea. Two decades ago, this Court noted, with apparent approval, that the first federal law restricting campaign contributions (the Act of 1907) was aimed "not merely to prevent the subversion of the integrity of the electoral process" but that its "underlying philosophy was to sustain the active, alert responsibility of the individual

citizen in a democracy for the wise conduct of government." *United States* v. *Auto Workers, supra,* 352 U.S. at 575. See, also, *id.* at 570. Even the staunchest guardians of the First Amendment on this Court have recognized that it may be "an evil for organized groups to have unrestricted freedom to make expenditures for directly and openly publicizing their political views and information supporting them"; such unrestricted freedom is "subject to some curtailment, in the interest of preventing grossly unbalanced presentations." *United States* v. *C.I.O., supra,* 335 U.S. at 145, 146 (Rutledge, J., concurring). More recently, Mr. Chief Justice Warren, Mr. Justice Black and Mr. Justice Douglas have said that "[i]f Congress is of the opinion that large contributions by labor unions to candidates for office and to political parties have had an undue influence upon the conduct of elections, it can prohibit such contributions." *United States* v. *Auto Workers, supra,* 352 U.S. at 598, n. 2 (Douglas, J., dissenting).

The need for regulatory action to ensure that federal elections are not unduly influenced by wealthy interests has increased with the years. With the shift from old-fashioned face-to-face electioneering to radio and television appearances, the extended duration of campaigns, the massively increased size of political organizations, and the spiralling costs of all ingredients of the campaign process, the importance of financial support has multiplied and with it the power of wealthy interests. See Findings I, ¶¶ 12, 88, 89, 93–95, 98, 100; J. App. 9–10, 49–51, 53, 54. Those realities of

today fully justify governmental intervention to preserve democracy in national elections.

B. THE APPROPRIATENESS OF THE MEANS

What has been said sufficiently demonstrates that there were compelling needs that Congress might address. It remains to show that the challenged legislation was in fact tailored to meet those needs.

One can object that, however prevalent is the undue influence—or the appearance of undue influence—of big money in federal elections and however sincere the congressional intention to deal with that problem and to democratize the electoral process, the present legislation is unresponsive to the stated objectives. Indeed, after denying the existence of the evil, appellants say as much.

The claim is extravagant. Of course, one can argue about the particular dollar figures selected to trigger recordkeeping or disclosure requirements or which establish ceilings on contributions or expenditures, and about the specific formulae used to determine eligibility for public funds. But, absent a compelling demonstration that the mechanisms chosen are grossly disproportionate to the problems addressed, it is no part of the judicial function to second-guess the legislative judgment.

In *Burroughs and Cannon* v. *United States, supra,* 290 U.S. at 547–548, the Court said:

> The power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that

> end presents a question primarily addressed to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone.

It may be that the test is somewhat stricter today, especially in the face of a First Amendment challenge. But no decision of this Court remotely suggests that constitutionality depends on a perfect scheme or a choice of what judges believe would be the best formula. On the contrary, in sustaining the Hatch Act, the Court only recently rejected the argument that Congress should have selected a different remedy in these words (*Civil Service Commission* v. *Letter Carriers, supra,* 413 U.S. at 567):

> Perhaps Congress at some time will come to a different view of the realities of political life and Government service; but that is its current view of the matter, and we are not now in any position to dispute it.

Congress was not writing on a clean slate. As we have noted, for almost three-quarters of a century there had been piecemeal efforts to deal with the problem of the undue influence of money in federal elections. But, as the court of appeals remarked (J.S. App. 1512), "[t]he achievements of the statutes were overmatched by what proved to be wholesale circumvention." "[T]he failure of piecemeal regulations to preserve the integrity of federal elections" (J.S. App.

1593)—a fact hardly debatable in view of what the court below characterized as "[t]he excesses revealed by this record" (J.S. App. 1581)—prompted Congress to act more vigorously and more comprehensively. That is, of course, a relevant consideration in assessing the appropriateness of the means now selected, each feature of which must be seen as an integral part of a comprehensive attempt, after long forbearance, to correct a perceived blight on our democratic processes. Cf. *South Carolina* v. *Katzenbach,* 383 U.S. 301, 308–315, 328, 337.

With this preface, we turn to the legislation to describe how its several features are calculated to contribute to the announced goals—reserving for later discussion specific constitutional objections to particular provisions.

1. Recordkeeping and disclosure requirements

The virtue of public disclosure in this area is too obvious to require extended discussion. Indeed, appellants do not challenge the requirement that campaign expenditures be disclosed (see Br. 170). They do, however, object to compulsory disclosure of all contributions over $100. Yet, that has been a requirement of federal law since 1910. See *United States* v. *Auto Workers, supra,* 352 U.S. at 575–576. The importance of such a rule to deter corrupt givers and discourage receivers from being corrupted by contributions is self-evident. As this Court concluded with respect to the like requirement in the Federal Corrupt Practices Act of 1925, "[t]he verity of this con-

clusion reasonably cannot be denied." *Burroughs and Cannon* v. *United States, supra,* 290 U.S. at 548.

Nor is that all. Fears of an improper tie between contributor and candidate aside, disclosure serves an informing function: the knowledge of who is backing which candidate aids the voter in appraising the contestants and determining what each really stands for.

a. The suggestion that only successful candidates be required to disclose their contributions (Appellants' Br. n. 8, p. 182) ignores the importance of the "bought" or "stalking horse" candidate who, though unsuccessful, may deflect votes from others whom the electorate might prefer if they knew the facts. Wisely, the law requires disclosure in primaries as well as general elections, and before the voting day. See 2 U.S.C. 434(a)(1)(A)(i); 2 U.S.C. 434(e). Drawing on the analogy the Court itself made in *United States* v. *Harriss,* 347 U.S. 612, 625, it is important "to maintain the integrity of a basic governmental process" that the voters know, with respect to every candidate, "who is putting up the money, and how much," so that they may better evaluate him.

These considerations apply to all candidates—successful or unsuccessful—including those that are entirely legitimate. As the court of appeals noted, commenting on the "angels" who often support minor party candidates, "the voting population has an interest in knowing the composition of the angels' wings and what makes them fly." J.S. App. 1545, n. 114. Not surprisingly, besides the Congress, the legislatures of 34 States have also reached that conclusion and require disclosure of campaign contributions. See *Developments in the Law—Elections,* 88 Harv. L. Rev. 1111, 1241–1242 (1975).

b. Appellants' further objection that the $100 limit for undisclosed contributions is unrealistically low (Br. 170, 174–175, 184–189) invites impermissible speculation. See *United States* v. *Finance Committee to Re-elect President,* 507 F. 2d 1194, 1200 (C.A.D.C.). It is the same ceiling selected by Congress in the 1925 Federal Corrupt Practices Act[8] and the Federal Election Campaign Act of 1971 and equal to or greater than that adopted by some 20 States. See *Developments in the Law—Elections, supra,* 88 Harv. L. Rev. at 1241–1242. A $100 contribution may well be sufficient to "attract the attention of the candidate." *Stoner* v. *Fortson,* 379 F. Supp. 704, 713 (N.D. Ga.). At all events, the $100 level serves to uncover the common situation in which many people associated with a single enterprise, or occupation, pool their contributions to make an impact.

c. Like considerations underlie the requirement that contributions exceeding $10 be recorded with the name of the donor. If this were not done, it would be possible to evade the disclosure requirement—and, indeed, the maximum contribution limitation—by successively contributing many small unidentified amounts.

---

[8] In the 1910 statute reporting was required of contributions which aggregated $50 per year. See *United States* v. *Auto Workers, supra,* 352 U.S. at 575–576.

2. Ceiling on contributions

Despite their challenge to disclosure of any or most contributions, appellants argue (Br. 117–118, 126–127) that disclosure is the only appropriate remedy for corruption through large donations. That is, however, an overly optimistic, if not naive, notion. It contradicts the consistent congressional judgment since the turn of the century that disclosure, alone, cannot deter the improper influence of aggregated wealth. Beginning with the outright ban on corporate campaign contributions in 1907, there have been repeated attempts to limit the size of contributions or the total expenditure of candidates, or both. Unfortunately, prior statutes contained so many loopholes that they had little effect. See Findings I, ¶¶ 130, 131, 137, 139–145; J. App. 156–158, 190–203. And so, in the light of recent experience, Congress determined to deal with the problem more comprehensively.

a. Setting a ceiling on contributions from any single source is the most direct way of preventing the risk of electoral corruption by big money. The objection cannot be that such an approach is ineffective: the argument must be that the weapon is unnecessarily lethal. But is it?

If the object is to reduce the risk that candidates, successful and unsuccessful, will be too closely tied—or appear to be—to large moneyed interests, how else is that goal to be accomplished? Certainly, the prospect of exposure will often deter the corrupt transaction and exposure after the fact may appreciably

weaken a corrupt link. As we have seen, those are good reasons for disclosure provisions. But experience convinced Congress that publicity is not a cure-all. Too often, revelations of undue influence by rich sponsors are simply shrugged off or produce a cynical indifference in a citizenry that despairs of reforming its politicians. What is more, reporting laws are not always obeyed. The risk of corruption is manifestly reduced when both parties, contributor and recipient, are subject to criminal penalty for exceeding the limitation.

There is, of course, a more radical alternative: exclusive public financing of political campaigns for federal office. Indeed, the optional scheme of the present law, as we shall see, serves that end by freeing Presidential candidates from total dependence on private contributions. But, unless public financing is combined with a prohibition, or a limitation, on private financing of campaigns, it cannot eliminate the temptation of wealthy interests to finance candidates who they believe will be sympathetic to their interests and perhaps provide reciprocal favors. Appellants cannot have it both ways: so long as private contributions toward the election of federal officials are permitted, it is necessary to restrict the amount from any single source.

b. What is more, ceilings on contributions importantly serve the distinct objective of widening active participation in the electoral process. They operate in several ways to make elections more democratic. The

candidate, no longer able to rely on a few wealthy supporters, must now invite the ordinary citizen to take an active part in the campaign. The citizen, now assured that every candidate is anxious for his help, will be more inclined to take a real interest, selecting more carefully and contributing more freely, in the knowledge that his support matters. And, finally, eliminating the huge advantage of those who could depend on an established list of large contributors will allow new challengers to enter the lists with a fair chance of successfully appealing to the electorate at large.

c. Once the principle of limiting the size of campaign contributions is conceded, the task is to devise rules which are fair and effective. That is the special achievement of the present legislation, which plugged most of the notorious loopholes of prior law. See Findings I, ¶ 137; J. App. 190. Now a ceiling of $1,000 is placed on individual contributions to, or earmarked for, a single candidate, 18 U.S.C. 608(b)(1), (4)(A) and (6), and an overall contribution limit of $25,000 is imposed with respect to any election period. 18 U.S.C. 608(b)(3). These provisions, combined with the $5,000 ceiling on contributions to a particular candidate by subsidiary political committees, 18 U.S.C. 608(b)(2), and the broad definition of what constitutes a contribution, 18 U.S.C. 591(e), are carefully designed to prevent, so far as possible, any undue financial link between candidate and contributors. Each of these ceilings complements the others and each is necessary to implement the objective.

3. Ceiling on expenditures

a. One provision of the new law, the $1,000 limitation on independent expenditures in support of a particular candidate, 18 U.S.C. 608(e), has attracted special criticism. Yet, it is a necessary ceiling if the restriction on large contributions is not to be evaded. Indeed, but for such a provision an individual or organization could massively support a favored candidate by spending directly on his behalf, rather than giving a money contribution to the candidate for him to spend. Cf. *United States* v. *C.I.O., supra,* 335 U.S. at 115; *United States* v. *Auto Workers, supra,* 352 U.S. at 579–587. And see Findings I, ¶ 136; J. App. 190.

A different approach to the problem was attempted in the Federal Election Campaign Act of 1971. See *American Civil Liberties Union* v. *Jennings,* 366 F. Supp. 1041 (D. D.C.), vacated as moot *sub nom. Staats* v. *American Civil Liberties Union,* 422 U.S. 1030. The new law has avoided the charge of "censorship" levelled at the repealed provision. Publications and broadcasters are no longer required to obtain the candidate's agreement to have the cost of a "commercial" counted against his expenditure limit: under present law, the sponsor's expenditure, though limited, is subject to no veto and the candidate is not penalized. One can readily appreciate the congressional preference for the present solution. But some restriction on independent campaign expenditures in support of a particular candidate is necessary if the limitations on campaign contributions are to work.

b. The rationale of the other ceilings on campaign expenditures is perhaps less self-evident. It is arguable that the risk of undue influence by aggregated wealth is fully met by ceilings on contributions and independent expenditures. The fact, however, is that when campaign spending is unlimited, the pressures for filling the void with large donations becomes irresistible.

The expenditure ceilings importantly contribute to lessening the opportunities and the temptations for money corruption. That has been the congressional judgment since 1911.

c. What is more, limiting the amount each candidate may spend tends to curb the exaggerated role of money in our elections. It also is likely to encourage participation as candidates by many who in the past remained inactive on the ground that, inevitably, they could not compete against the established fund-raiser. The limit placed on a candidate's expenditure from his personal or family funds (18 U.S.C. 608(a)) contributes to the same end, by decreasing the advantage a wealthy candidate would otherwise enjoy—especially under a regime of strict contribution ceilings—and thereby widening the opportunities for successful candidacy. The combined effect of these provisions also must be substantially to democratize federal elections.

4. Public financing of Presidential elections

Many of the foregoing considerations support the provision of public funds—within the ceilings already established—in Presidential elections. We need not

belabor the point that the availability of public money lessens the candidate's dependence on contributions from wealthy groups and individuals. To be sure, federal funds are not given to a candidate who does not prove himself a serious contender. We later discuss the claim that the scheme is discriminatory. But, for present purposes, it is enough that the public funding provisions obviously further the objective of diminishing the danger of corruption through dependence on large campaign contributions, and, equally important, they widen the opportunities of ordinary citizens to participate actively in electoral campaigns, both as candidates and as supporters.

II

THE LEGISLATION DOES NOT IMPERMISSIBLY TRENCH ON FIRST AMENDMENT RIGHTS

We have shown that the challenged legislation responds to legitimate and compelling governmental concerns and that it implements powers reserved to the national Congress by the Constitution. That would be the end of the inquiry were it not for the claim that the new law impermissibly discriminates (see Point III, *infra*) and trenches on First Amendment rights. We now discuss the latter objection.

A. THE DISCLOSURE REQUIREMENTS

We have already discussed the compelling objectives served by disclosure of political contributions and expenditures, and explained why it is necessary

to fix the disclosure limit low and to insist that contributions be revealed by all candidates before the voting occurs (*supra,* pp. 29–31). We now discuss the arguments that the disclosure requirements violate the First Amendment.

While the arguments overlap, it will be useful to distinguish two propositions: (1) the claim that individuals have an unconditional right to anonymous speech, regardless of any association with others for a common purpose; and (2) the distinct claim of associational privacy, independent of any connection with speaking or writing. The first argument primarily rests on *Talley* v. *California,* 362 U.S. 60; the second largely relies on the N.A.A.C.P. cases, *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449; *Bates* v. *Little Rock,* 361 U.S. 516; *Shelton* v. *Tucker,* 364 U.S. 479; *Louisiana* v. *N.A.A.C.P.,* 366 U.S. 293; *N.A.A.C.P.* v. *Button,* 371 U.S. 415; *Gibson* v. *Florida Legislative Comm.,* 372 U.S. 539. We deal with the claims in that order.

1. The right to speak or write anonymously

a. It is far from clear how the right to speak freely came to include a right to speak anonymously. As Mr. Justice Clark has noted, "[t]he Constitution says nothing about freedom of anonymous speech." *Talley* v. *California, supra,* 362 U.S. at 70 (dissenting opinion). Presumably, the only rationale for recognizing such a right is a concern that requiring disclosure of the true identity of the speaker or writer may expose him to reprisal and thereby deter him from expressing

his views. But one may well question whether that consideration justifies First Amendment insulation for all speech which is unlabelled or mislabelled as to source, regardless of any showing that the author is truly in danger of retaliation. As Mr. Justice Black himself wrote in support of a requirement that foreign agents disclose their political propaganda activities (*Viereck* v. *United States,* 318 U.S. 236, 251 (dissenting opinion)):

> Resting on the fundamental constitutional principle that our people, adequately informed, may be trusted to distinguish between the true and the false, the bill is intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source. Such legislation implements rather than detracts from the prized freedoms guaranteed by the First Amendment.

That has been the predominant view: absent very unusual circumstances, a mere requirement that the speaker or sponsor be identified has been sustained, whether its purpose was to inform the readers of a newspaper (*Lewis Publishing Co.* v. *Morgan,* 229 U.S. 288), local governmental authorities (*New York ex rel. Bryant* v. *Zimmerman,* 278 U.S. 63), the voters (*Buroughs and Cannon* v. *United States, supra*), the Members of Congress (*United States* v. *Harriss, supra*), or the public at large (*Communist Party* v. *Control Board,* 367 U.S. 1). See, also, *Rabinowitz* v. *Kennedy,* 376 U.S. 605. That principle is the predicate of many State and federal statutes (see *Communist*

Party v. *Control Board, supra,* 367 U.S. at 97–101), including provisions in the United States Code (18 U.S.C. 612 and 47 U.S.C. 317) and in the laws of 43 States (see *Developments in the Law—Elections, supra,* 88 Harv. L. Rev. at 1286–1287, and *Talley* v. *California, supra,* 362 U.S. at 70, n. 2 (Clark, J., dissenting)) requiring disclosure of the sponsors of political campaign literature.

b. Against all this, appellants invoke (Br. 190–191) this Court's decision in *Talley* v. *California, supra,* striking down a city ordinance that banned the distribution of anonymous handbills as violating the First Amendment. Because that ruling, at first blush, seems at odds with all that went before, we must consider it with special care.

Some passages of the *Talley* opinion do, indeed, suggest an absolute and wholly individual right of anonymous speech. But that is not the actual holding of the case, which involved an ordinance prohibiting "all handbills under all circumstances anywhere that do not have the names and addresses printed on them." 362 U.S. at 64. Indeed, the Court's opinion expressly reserved the question of "the validity of an ordinance limited to prevent [fraud, false advertising and libel] or any other supposed evils." *Ibid.* See, also, 362 U.S. at 66–67 (Harlan, J., concurring). And, in citing *Talley* in later cases, the Court has characterized it as condemning a regulation of speech that was "overbroad" in that it swept unnecessarily widely to deal with the particular problem addressed. See, *e.g., Shelton* v. *Tucker, supra,* 364 U.S. at 489.

In sum, what *Talley* establishes is this, and nothing more: that the First Amendment protects anonymous writings against governmental insistence on disclosure when the purpose is insufficiently important or the means are not carefully tailored to achieve only legitimate purposes.

At all events, the proposition that anonymity is an absolute right is foreclosed by later decisions of the Court. We need only cite *Communist Party* v. *Control Board, supra,* and *Branzburg* v. *Hayes,* 408 U.S. 665. See, also, *United States* v. *Nixon,* 418 U.S. 683; *Procunier* v. *Martinez,* 416 U.S. 396, 413–414. Nor is there any basis in the Court's cases for a claim that anonymous political speech in particular enjoys First Amendment immunity. On the contrary, the Court has been reluctant to apply *Talley* so as to condemn laws which require the sponsors of campaign literature to reveal themselves. See *Golden* v. *Zwickler,* 394 U.S. 103; cf. *Hill* v. *Printing Industries of the Gulf Coast,* No. 74–456, decided June 30, 1975. That hesitation presumably reflects recognition of the unusually compelling interest in assuring that voters know who is backing which candidate—so that they may better appraise the candidate and not be misled by a false assumption as to the interests he represents.

c. But the present case does not even involve a requirement that all who speak or write in support of a particular candidate identify themselves. Because the focus of the challenged legislation is the undue influence of money, disclosure is confined to paid com-

mercials. What is more, the Federal Election Campaign Act imposes no immediate identification requirement with respect to spoken or written advertisements. No doubt, in some instances it will be possible to determine from the reports on expenditures filed after the fact what group or individual sponsored a particular commercial. But, even then, all that can be discovered is the identity of the payor, normally the candidate himself or his campaign committee. This is a much lesser interference with anonymous speech than a contemporaneous labelling requirement.

To be sure, disclosure of the identity of contributors to a particular candidate connects them indirectly with his campaign speeches and commercials. But the link is far too tenuous to justify any claim that the contributor's speech is involved.

The upshot is that the challenged law only remotely and incidentally affects anonymous speech. Its objective is not to prevent pseudonymous political writing. Indeed, nothing in the new legislation would require the authors of a modern series of *Federalist Papers* to reveal their identities. What is aimed at is secret money, not anonymous writing. The law is narrowly drawn to accomplish that objective. In those circumstances, it is not a sound objection that, unavoidably, there is an incidental, albeit very limited, effect on anonymity.

2. The right of associational privacy

Appellants also charge (Br. 171–184) that the challenged legislation, by requiring disclosure of political contributions and expenditures, impinges on the

right of free association. The First Amendment protects political association as an aspect of freedom of assembly—whether or not speech, spoken or written, is directly involved. See *Cousins* v. *Wigoda,* 419 U.S. 477, 487–488, and cases there cited. Not only flat prohibitions on such association, but also "significant encroachment[s]," implicate the First Amendment and will not be sustained if there is "a less drastic way of satisfying * * * legitimate [governmental] interests." *Kusper* v. *Pontikes,* 414 U.S. 51, 58–59. Our submission is that the present law has no such "significant" effect and that, if it does, compelling needs justify that incidental consequence.

a. The Court has never suggested that secret membership in any organization is always an absolute constitutional right. On the contrary, in *Communist Party* v. *Control Board, supra,* compelled disclosure of membership was upheld, and no Member of the Court in dissent objected to the requirement that the Party register and list its members if membership were neither stigmatized nor made potentially criminal. See 367 U.S. at 136–137 (Warren, C.J., dissenting), 138 (Black, J., dissenting), 190 (Douglas, J., dissenting), 191 (Brennan, J., joined by Warren, C.J., dissenting). Nor has the Court ever held that compelled disclosure of membership is always, or usually, an "encroachment" on freedom of association which calls for special justification. Indeed, the decisions suggest the opposite: that the First Amendment shields secret membership only when there is a real danger of exposure to reprisal. See *N.A.A.C.P.* v. *Ala-*

bama, supra, 357 U.S. at 462–463; *Bates* v. *Little Rock, supra,* 361 U.S. at 523–524; *N.A.A.C.P.* v. *Button, supra,* 371 U.S. at 435–436; *Gibson* v. *Florida Legislative Comm., supra,* 372 U.S. at 556–557.

b. But, even assuming that all restrictions on privacy of association implicate the First Amendment, sufficiently compelling governmental interests will vindicate some intrusions. The test of constitutionality must take into account both the importance of the legislative objective and the degree of the invasion of privacy, bearing in mind that only the least intrusion necessary to accomplish a legitimate end is permissible. We consider the challenged legislation in that light.

We have already noted the important congressional concerns which underlie the disclosure requirements of the Federal Election Campaign Act Amendments and the care taken to select mechanisms that would be effective without sweeping too broadly. See *supra,* pp. 29–31, 41–42. It remains only to emphasize how little these provisions trench on associational rights.

First, anonymous membership in groups, even purely political associations, is not prevented. The challenged law requires no one to say (or have said about him) whether he belongs to the Republican Party, the Democratic Party, the Conservative Party, the Progressive Party, or indeed, the Communist Party. Compare *Sweezy* v. *New Hampshire,* 354 U.S. 234. Indeed, so long as membership involves no greater annual contribution than $100, it may remain secret, whatever the organization. That is because the Campaign Act is concerned with money, not membership.

But it does not follow that by contributing more than $100 to an organization, the donor exposes his membership. The law reaches only contributions "made for the purpose of influencing the nomination for election, or election, of any person to Federal office * * *." 2 U.S.C. 431(e)(1)(A). Obviously excluded are gifts, dues or subscriptions paid to non-political associations, as well as to non-partisan political organizations. What is more, contributions to less neutral political groups need be disclosed only if they are earmarked (expressly or impliedly) for one or more specific candidates. The challenged statute exposes only contributions which the giver intends shall be used for a particular candidate or slate of candidates.[9]

A disclosure requirement so confined has only a marginal effect on membership in existing organizations and associations. While it is arguable that those who support a particular candidate are thereby joining in a new "association," that is a strained concept. Especially when contributions are limited as to amount and the number of givers is increased, it is almost as unreal to characterize all contributors, for the most part unknown to each other and in no way organized together, as an "asociation" as it would

[9] The Commission has rendered an interim ruling that contributions to an established political party which intends to field candidates in the upcoming election are subject to the limitations, even though the identity of those candidates is not yet determined. FEC AO 1975–4, in 40 Fed. Reg. 29793–29794.

so view those who eventually vote for the candidate.

Nor is the relationship between most contributors and the candidate, although more meaningful than the abstract link among contributors themselves, the kind of association traditionally embraced by the constitutional concept of "free association." Although the candidate will have his close campaign associates who may also be contributors, their identity is no secret and their direct association with the candidate will not be affected by a disclosure requirement. So, also, large contributions may create a close tie, corrupt or otherwise, between giver and receiver; but that special relationship, based on financial dependence, is now eliminated. The bulk of supporters, on the other hand, will have no real contact with their candidate, and he himself will not even know their names. It does not deprecate the practical importance of mass support, or the national interest in more democratic electoral campaigns, to recognize that the "association" between the individual supporter and the candidate is very distant kin to the right of assembly which the First Amendment protects.

c. But, even viewing the supporter's choice of a particular candidate as in some sense an exercise of the right of free association, the challenged law creates only the mildest deterrent, if any, to that exercise. In the climate of today, in which extreme views are regularly uttered, without restraint, it is doubtful that many are significantly discouraged from contributing because the gift may become known. What

is more, disclosure is not contemporaneous with the gift, and it will be a rare case where an individual contribution of $1,000 or less will be deemed worth reporting by the press.

There is no substantial showing that the limited disclosure requirements of the challenged statute will deter any speech or any association. The court of appeals correctly characterized the evidence on this score as "scant," "skimpy" and "thin." J.S. App. 1546 and n. 115. The truth of the matter is that the disclosure provisions of the new law touch only tangentially upon contributors' rights of free speech or free association. At all events, the intrusion is so slight that it provides no basis for invalidating an important part of the regulatory scheme.

B. CEILINGS ON EXPENDITURES

Appellants contend (Br. 79, 107) that the expenditure ceilings are particularly offensive to the First Amendment because they directly and intentionally "cut off" speech, "flatly prohibiting" further speech after the allowance is spent. We examine that charge, first in its most extreme form: that any spending limit is unconstitutional. We then consider the particular expenditure ceilings the Act imposes.

1. The principle of spending ceilings

a. We cannot too often stress that the legislation in suit is concerned with *money,* not speech. That is not the same thing, even today. Many campaign expenditures are unrelated to speech and there are still ways of communicating that do not involve spending.

But, more important, what is regulated is one of the means for communication, not speech itself. There is no censorship whatever: the candidate and his supporters may say what they like. What is more, they remain entirely free to choose their medium of communication. The law does not limit the total number of hours a candidate can speak or the number of words that can be written on his behalf. The evil aimed at is not prolixity, but the undue influence and the gross disparities resulting from unlimited spending in electoral campaigns.

b. So saying, we do not blink the fact that the effect of spending limits—at least limits low enough to have a bite—must be to restrict some political speech. But is that enough to invalidate the law? Let us examine a few hypothetical examples.

Consider a regulation that restricts speakers in a public park to a single "Speaker's Corner" and then, in the interest of fair access, limits any single speaker to one two-hour speech a week. The soap-box orator who has more to say is literally "cut-off" and, we may assume, has no practical alternative forum. Is such a reasonable rule good only for Hyde Park in London but not for Lafayette Park in Washington? And what of a regulation that bans door-to-door canvassing after midnight or electioneering at the polls? Is it permissible to close courthouses and government offices to political campaigning?

The answer has long since been given. As the Court recently summarized its prior holdings, "reasonable 'time, place and manner' regulations may be necessary to further significant governmental interests, and are permitted." *Grayned* v. *City of Rockford,*

408 U.S. 104, 115 and cases cited at n. 30. Of course, speech cannot be wholly suppressed in the guise of "regulation." But, almost necessarily, every restriction of time and place in a finite world imposes a quantitative limitation, it "cuts off" some speech. Given a sufficient governmental interest, such a neutral (as to the content of speech) restriction does not violate the First Amendment.

c. Appellants repeatedly cite (*i.e.,* Br. 47, 53, 81, 83, 109, 119, 141) *Mills* v. *Alabama,* 384 U.S. 214, which invalidated a state law as applied to a newspaper editor who was prevented from publishing on election day an editorial urging voters to cast their ballots in a particular way. As with *Talley* v. *California, supra,* the opinion perhaps sweeps more broadly than the holding and we must examine the case with some care.

Mills can be read as saying that "no test of reasonableness" can justify a curb on press freedom. 384 U.S. at 220. No such ruling was necessary to the result, since the Court also found a "fatal flaw" in the justification tendered by the State (*ibid.*): a sufficient ground for reversal was that the statute was "wholly ineffective" in accomplishing its alleged objective.

In any event, the statement in *Mills* does not control here. The Federal Election Campaign Act—unlike the Alabama statute—in no way restricts the freedom of "a newspaper editor to * * * urge people to vote one way or another in a publicly held election." *Ibid.* As we have already noted (*supra,* pp. 47–48), our case has nothing to do with freedom of the press, which is left wholly unfettered.

Under *New York Times Co.* v. *Sullivan,* 376 U.S.

254, 266, and *Bigelow* v. *Virginia,* No. 73-1309, decided June 16, 1975, slip op., pp. 8–16, a paid editorial or, indeed, any advertisement containing information of "public interest" published in a newspaper enjoys the same protection as the editor's own views printed on the editorial page. But nothing in *Sullivan* or *Bigelow,* or in any other case, suggests that a restriction imposed on the sponsor of an advertisement, before publication, must be judged by the same standard that governs attempted regulation of the editor's freedom to print what he chooses. On the contrary, the Court has consistently viewed the press as occupying a particularly protected position under the First Amendment. See, *e.g., Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241; *New York Times Co.* v. *United States,* 403 U.S. 713; *Pittsburgh Press Co.* v. *Human Rel. Comm'n,* 413 U.S. 376, 381–382, 391. Indeed, Madison's original draft of the First Amendment singled out freedom of the press as alone "inviolable." See *New York Times Co.* v. *United States, supra,* 403 U.S. at 716 (Black, J., concurring).

The sponsor of a paid political message (whether candidate or independent supporter) can be denied all access to the medium of his choice, not only by private editors, *Columbia Broadcasting* v. *Democratic Comm.,* 412 U.S. 94; *Miami Herald Publishing Co.* v. *Tornillo, supra,* but, at least in some circumstances, by government itself, *Lehman* v. *City of Shaker Heights,* 418 U.S. 298; 47 U.S.C. (Supp. III) 399(a). Cf. *Nat. Broadcasting Co.* v. *United States,* 319 U.S. 190, 226–227. Other would-be sponsors of a partisan political message are wholly excluded by law from every public forum. *Civil Service Commission* v. *Letter Carriers,*

supra; Broadrick v. *Oklahoma,* 413 U.S. 601. Similarly, although the press ordinarily cannot be stopped from publishing information which prejudices a criminal trial, the "sources" of that information can be enjoined from supplying it. *Sheppard* v. *Maxwell,* 384 U.S. 333, 359, 361–363. And it would seem that in some circumstances even a United States Senator can be enjoined from delivering material to a private publisher that the latter probably could not be prevented from printing. Compare *Gravel* v. *United States,* 408 U.S. 606, with *New York Times Co.* v. *United States, supra.* See, also, *Kleindienst* v. *Mandel,* 408 U.S. 753.

The most recent, and the clearest, statement of the principle appears in *Bigelow* v. *Virginia, supra.* In condemning the application to a newspaper editor of a State statute prohibiting the publication of an advertisement encouraging abortion, the Court expressly noted (slip op. at 18):

> The strength of appellant's interest was augmented by the fact that the statute was applied against him as publisher and editor of a newspaper, not against the advertiser or a referral agency or a practitioner. The prosecution thus incurred more serious First Amendment overtones.

d. We have already discussed the important concerns that underlie both the overall limitation on campaign spending and the ceiling on "unauthorized" or "independent" expenditures in support of a particular candidate (*supra,* pp. 35–36). Those reasons, we submit, are sufficient to support the indirect restraint on speech which the spending limitations impose. Unlike the situation in *Sullivan* and *Bigelow,* where the applicability of the restriction on speech depended on

the content of the message being delivered, the Act's restrictions apply neutrally to all excessive campaign expenditures (regardless of the particular message they seek to support and whether that message is critical or laudatory of any individual). No message is prohibited because of its content; all persons are free under the Act to say what they wish, within the limits of the Act's monetary ceilings. The Act's restrictions thus are more akin to limitations on the time, place, and manner of speech (already discussed) or to the similarly neutral regulation applied under the "fairness doctrine" to the broadcast media. See *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* 395 U.S. 367. With these general considerations in mind, we now turn to examine the particular limitations in the light of the First Amendment.

2. Overall limitations on candidate expenditures

Having shown that the First Amendment does not bar all limitations on campaign spending, we now consider the overall limitations imposed on a candidate's campaign expenditures (18 U.S.C. 608(c)), the limitation on his personal contribution to that total (18 U.S.C. 608(a)), and the limitation on additional expenditures on behalf of a candidate by official political party committees (18 U.S.C. 608(f)).

Each of these provisions represents an accommodation between two competing sets of considerations. On the one hand, the ceilings serve the objective of reducing the undue influence of money in elections and preventing the exaggerated advantage that great wealth—whether of the candidate, his party or his supporters—

presently enjoys. On the other hand, they recognize the importance of allowing as much freedom as possible within the boundaries of effective regulation and respect the reality that political campaigns cost money and that the ability to raise funds is, in an important degree, a reflection of the candidate's public appeal (when individual and group contributions are severely limited). We submit that in these provisions Congress struck a reasonable and justifiable balance which the courts should accept.

We do not claim that each of the ceilings is fixed at the only defensible level. Indeed, experience may suggest alteration of one limitation or another, or even an entirely new formula. But the Constitution does not require perfection at the very inception of an experiment. It is enough, at this stage, to know that the law does not intentionally discriminate (see Point III, *infra*) and does not shackle the existing electoral system.

We stress two aspects. The first is that the expenditure limitations are deliberately devised to avoid destroying the party system. That is accomplished by allowing national and state committees to make expenditures which are not counted against the candidate's allowance. Of course, it was necessary to impose a limit on those party expenditures in support of a particular candidate, but the ceilings are not niggardly.

The other significant feature of the system is the ample allowance fixed for spending by the candidate (or his campaign committee). An important aim of the ceilings is to curb the continuously upward spiralling cost of campaigns—which, experience

teaches, is inevitable when the sky is the limit—and the candidates' consequent dependence on wealthy interests and practical elimination of the financially-disadvantaged candidate. But the fact is that, in the most recent elections, the overwhelming majority of candidates for the House of Representatives and the Senate did not spend more than the amounts now allowed. See Findings IIA, ¶¶ 18–19, 28–29, 40–41, 47–48; J. App. 442–443, 445, 448–449, 450. Every indication thus is that the present limits will cut off no debate.

3. The ceiling on independent expenditures

Given the twin premises that there must be an overall ceiling on what a candidate may spend to win election and that there must be a limit on what any individual or group may contribute to that end, the question Congress faced was how to avoid circumvention of these ceilings by those who decide to help the candidate by directly spending on his behalf—whether by sponsoring printed or broadcasted commercials or otherwise.

The problem is a difficult one. There is a triple dilemma: if the candidate is allowed to screen the material he deems worthwhile because the expenditure consumes a portion of his allowance, independent supporters are subjected to censorship; if, on the other hand, the candidate has no veto and unauthorized commercials are counted against his expenditure ceiling, he may lose control of his own election campaign; and, finally, if independent expenditures are unlimited and unaccounted, the spending and giving limitations are seriously compromised.

There is no perfect solution. But, on balance, Congress has chosen a realistic compromise which, while effective, trenches least on First Amendment values. The scheme embodied in 18 U.S.C. 608(e) allows, but limits, "independent" or "unauthorized" expenditures in support of a particular candidate, exempting them from the candidate's spending ceiling and from his control. It thus avoids any issues of censorship or of the candidate's freedom to spend his allowance as he chooses. The only question remaining is whether the limitation on individual and group expenditures itself involves an impermissible curtailment of speech.

The answer is negative. As we have seen (*supra,* p. 22), the problem of the "indirect" contribution has plagued all prior legislation and rendered it largely ineffective. Unless no effort is to be made to reduce the undue influence of big money in federal elections, there must be some limit on independent expenditures. And, because those expenditures are not counted against the candidate's spending ceiling, that limit must be low.

Of course, an allegation of necessity does not automatically establish constitutionality. Such an argument, for instance, would probably not sustain a restriction on the news media's own editorializing in favor of a candidate and the present law accordingly exempts that kind of support. But, as we have just shown, the immunity of sponsors of paid commercials is not the same. Here we deal with a very limited restriction that is covered by the principle, articulated above (*supra,* p. 44), that a sufficiently compelling need will vindicate a partial restraint on a would-be sponsor's desire to promote his candidate.

595-040—75——5

If the risk of improper pressures on governmental employees and the "unseemliness" of their electioneering to maintain their employers in power is enough wholly to disable several million citizens from active participation in electoral campaigns—as does the Hatch Act which this Court upheld in the *Civil Service Commission* v. *Letter Carriers, supra*—a concern for preserving the integrity of the political process and opening it up meaningfully to more people is a sufficient predicate for merely limiting the money any citizen can spend on behalf of a particular candidate.

C. APPELLANTS' OTHER FIRST AMENDMENT CHALLENGES

1. Preliminary comments

Two preliminary comments are in order.

a. This case does not involve the doctrine barring prior restraints on speech. The legislation makes no attempt to censor; it is entirely neutral about the content of political advocacy. The same rules apply whether the candidate or the supporter is a Republican or Democrat or Liberal or Conservative or Independent or Communist; whether what is said or written is polite or rude, patriotic or seditious, true or false; whether the cause espoused is deemed healthy or subversive. That the law authorizes injunctive relief (2 U.S.C. 437g(a)(5) and (7) is therefore irrelevant.

Literally, of course, any bar to speech enforceable by injunction is a "prior restraint." But that is not the point of the "prior restraint" doctrine. It reflects an abhorrence of censorship, an attempt to control con-

tent. *Near* v. *Minnesota,* 283 U.S. 713–719; *Pittsburgh Press Co.* v. *Human Rel. Comm'n., supra,* 413 U.S. at 389–390. The doctrine has no application to a clear-cut prohibition or limitation unrelated to content. The challenged statute no more imposes a forbidden "prior restraint" than would a law authorizing injunctions to enforce a ban on the sale and distribution of newspapers on throughways or, indeed, a rule fixing the total time for television commercials on any given channel at two hours per day—whatever other First Amendment objections might prevail against such restrictions.

b. There is likewise no issue of press freedom here. The legislation is at pains to avoid any restriction whatever, qualitative or quantitative, or temporal (see *Mills* v. *Alabama, supra*), on what publishers and broadcasters may say about election issues or candidates. Expressly excluded from the definition of "expenditure" is "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication." 2 U.S.C. 431(f)(4)(A); 18 U.S.C. 591(f)(4)(A). Nor is what such a publisher or broadcaster writes or says treated as a "contribution," however openly he supports a particular candidate. See 120 Cong. Rec. H10330 (daily ed., Oct. 10, 1974); H.R. Rep. No. 93–1239, 93d Cong., 2d Sess. 4 (1974); opinion below, J.S. App. 1536–1537. No obligation of reporting or disclosure is imposed on the press or the electronic media.

It may be that publishers and broadcasters are indirectly affected by the ceilings on political giving and spending in that the total volume of paid political commercials will decrease. But any such injury is too insubstantial and remote to have constitutional significance. In its impact on the press, this statute bears no resemblance to the direct tax struck down in *Grosjean* v. *American Press Co.*, 297 U.S. 233, on the ground that it had "the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers." *Id.* at 251.

The constitutional guarantee of freedom of the press does not merely condemn governmental action that "takes money from the pockets" of publishers and broadcasters, but exists for the benefit of the citizenry. *Id.* at 250; *New York Times Co.* v. *Sullivan, supra,* 376 U.S. at 266; *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* 395 U.S. 367, 390. But the interest of viewers and listeners and readers, "paramount" as it is, does not require newspapers or broadcasters to accept any paid political message. *Columbia Broadcasting* v. *Democratic Comm., supra;* 47 U.S.C. 315(a); *Miami Herald Publishing Co.* v. *Tornillo, supra.* Indeed, so long as they do not discriminate, even governmentally-owned or assisted channels of communication are constitutionally free, at least in some circumstances, to ban all political advertisements. 47 U.S.C. (Supp. III) 399 (a); *Lehman* v. *City of Shaker Heights, supra;* and see *Columbia Broadcasting* v. *Democratic Comm.,*

supra, 412 U.S. at 121–132 and 146–147 (White, J., concurring). Nor does the First Amendment's concern for the widest debate prevent a flat ban on active electioneering—including the sponsoring of commercials—by several millions of government employees. *Civil Service Commission* v. *Letter Carriers, supra; Broadrick* v. *Oklahoma,* 413 U.S. 601. There is, therefore, no valid basis for complaint that the present legislation "deprives" the public of some political speech.

Moreover, no real risk exists that any speech will go uncommunicated. To be sure, 18 U.S.C. 608(e) prevents any independent individual or group from placing a full-page advertisement supporting a single candidate in a major daily newspaper or sponsoring more than a modest television commercial. See Findings I, ¶¶ 65, 86; J. App. 32, 49. But the provision does not bar the expression of that support in other ways, nor does it affect the freedom of the candidate or his campaign committee from using contributions to this end.

Whatever the impact of Section 608(e) on the sponsor's right of free speech (see *supra,* pp. 47–52), it does not work any measurable abridgement of the public's interest in a free press. Given the "equal time" provision of the Communications Act, 47 U.S.C. 315, the Fairness Doctrine (including the "personal attack" and "editorial-reply" rules), and the complementary *Cullman* doctrine, there is no reason to anticipate that the challenged legislation will deprive the audience of any point of view. See *Columbia Broadcasting* v.

Democratic Comm., supra, 412 U.S. at 122–125; *Red Lion Broadcasting Co.* v. *Federal Communications Commission, supra,* 395 U.S. at 386–395. On the contrary, the object is to encourage more voices to be heard by subduing—but not suppressing—the disproportionate influence of the wealthy few. Cf. *Citizen Publishing Co.* v. *United States,* 394 U.S. 131, 139–140; *Associated Press* v. *United States,* 326 U.S. 1, 20. That result serves, rather than defeats, the premise of press freedom.

2. Contribution ceilings and freedom of speech

Limitations on direct political contributions—as opposed to expenditures—do not violate the First Amendment. For this proposition, we need say little more than that it has been endorsed by Mr. Chief Justice Warren, Mr. Justice Black and Mr. Justice Douglas. As already noted, the three Justices, dissenting in *United States* v. *Auto Workers, supra,* 352 U.S. at 593–598, joined in an opinion holding the total ban on union expenditures for a political broadcast offensive to the First Amendment but expressly stated that Congress "can prohibit * * * large contributions by labor unions to candidates for office and to political parties." *Id.* at 598, n. 2.

a. To conclude otherwise is to equate money and speech or money and political association. This would turn the decision in *New York Times Co.* v. *Sullivan, supra,* on its head. That case held that paid political expression remains protected speech notwithstanding

that it is paid for: it did not remotely suggest that the giving—or indeed the spending—of money for political purposes is itself a First Amendment activity. Nor does any decision of this Court hold that the mere pooling of financial contributions for political purposes is protected "assembly" or "association". The focus of the First Amendment is on the right of citizens to join together in body or mind, in speech or action, for a common political cause; meeting and membership are protected, not the mingling of money. See *N.A.A.C.P.* v. *Alabama, supra,* 357 U.S. at 460; *Bates* v. *Little Rock, supra,* 361 U.S. at 522–523; *N.A.A.C.P.* v. *Button, supra,* 371 U.S. at 430–431; *Kusper* v. *Pontikes, supra,* 414 U.S. at 56–57.

So saying, we do not ignore that "[i]t usually costs money to communicate an idea to a large audience," *United States* v. *Auto Workers, supra,* 352 U.S. at 594 (Douglas, J., dissenting), and that political parties and groups cannot be effective without substantial funds. But we must be wary of equating contemporary "reality" with constitutional necessity. Cf. *Felix Frankfurter Reminisces* 339–340 (Anchor 1962). The present importance of money in federal elections is not a constitutional imperative: there are ways of diminishing that dependence and, to a modest extent, the new law works in that direction.

Nevertheless, it would presumably offend the First Amendment rights of free expression and free association to prohibit all spending by individuals and groups for political purposes. But expenditures and

contributions must be distinguished. The nexus between expression and expenditures for political "commercials" is closer than it is with respect to contributions, which may or may not be used for written or spoken statements supporting the candidate and, at best, will not directly finance the contributor's own message. If adequate public funds were made available on a non-discriminatory basis to candidates, political parties and other political organizations, there would be no constitutional inhibition to a complete ban on direct political contributions from private sources. The fact is that private contributions are not essential to freedom of expression or freedom of association.

b. At all events, merely restricting the amount of contributions to, or earmarked for, specified political candidates does not violate the First Amendment. The challenged provisions do not inhibit the freedom of citizens to form a political group or to join an already existing party. Indeed, as long as the organization is not the express agent of a single candidate, any individual remains free to contribute up to $25,000, and, if the organization is not actively committed to any particular candidate, no limit applies to contributions made by committees that do not go to individual candidates. There can be no claim that political associations are starved of necessary funds. Nor are they rendered impotent. While qualifying political committees are limited to a $5,000 direct contribution to any single candidate (18 U.S.C. 608(b)(2)), their

total contributions are unrestricted, and official party committees may, in addition, spend substantial sums on behalf of any candidate (18 U.S.C. 608(f)).

The citizen also retains his individual voice. He remains free meaningfully to give support, in his own name, to one or more candidates. A contribution of $1,000—especially when no one can make a larger one—is not derisory. He may, moreover, spend another $1,000 per candidate (with no total limit) in support of his choices (18 U.S.C. 608(e), discussed ~~*infra*~~ *supra*, pp. 47–52), plus $500 in incidental expenses (18 U.S.C. 591(e)(5), 591(f)(4)). Only relatively few will be affected by these limits and even they are far from silenced.

As we have seen (*supra,* pp. 23–27), one objective of the new law is to encourage more citizens to become politically active by assuring the less affluent that their donations will not be superfluous or so relatively insignificant as to go unnoticed. The legislation, far from stifling the expression of any point of view, or discouraging political association, tends to open political campaigns to every opinion and thereby serves the central goal of the First Amendment.

3. Public financing and the First Amendment

Except insofar as the claim of invidious discrimination against challengers and new or minor parties (with which we deal in Point III, *infra*) rests on the First Amendment as well as the Fifth, public financing of federal election campaigns involves no First Amendment violation. The suggestion that the scheme

impermissibly "involves" the government in the area of political expression is without substance.

a. The dispositive fact is that the First Amendment includes no "Establishment Clause" with respect to speech or press or assembly. The "church-and-state" analogy (Appellants' Br. 146–150) is therefore inapt. Government may not censor speech, but it may subsidize or build or operate or allocate the means of communication—activities prohibited with respect to religion. One need only consider the United States Postal Service, the licensing and regulation of commercial broadcasting, the substantial grants to educational radio and television stations (47 U.S.C. 390–399), the expenditures made by State and Federal governments to conduct elections, the preferential postal rates (39 C.F.R. 132.2) and antitrust exemptions (15 U.S.C. 1801–1804) for newspapers, the comprehensive regulation of telephone and telegraph operations and charges (47 U.S.C. 201–223), and the establishment and maintenance of public libraries, halls and parks.

To be sure, one can argue, as a matter of policy or political philosophy, that it is "dangerous" to make federal elections dependent on public money, because the government—presumably the incumbent Administration—will then be in a position, albeit illegally, to manipulate the outcome. We could retort that it is safer to place that power of the purse in governmental hands than in the hands of aggregated private wealth. But, constitutionally, those considerations are irrelevant. In the eye of the Constitution, there being

no prohibition, it is enough that public funds are appropriated for objectives that Congress (as we have seen) has power to further.

b. Given the ends served by public financing of Presidential elections, the necessary moneys can be raised by taxes levied in the promotion of the "general Welfare of the United States." Const., Art. I, Section 8, clause 1; see *United States* v. *Butler,* 297 U.S. 1, 66. As this Court recently observed, "it is difficult to single out any [governmental function supported from general revenues] of a higher order than the conduct of elections at all levels to bring forth those persons desired by their fellow citizens to govern." *Bullock* v. *Carter, supra,* 405 U.S. at 148–149. Nor is government limited to providing election machinery and supervisory staff: it may directly subsidize or reimburse candidates or their political parties. *American Party of Texas* v. *White,* 415 U.S. 767, 791–794.

In our view, there could be no objection if the moneys needed were directly appropriated from the Treasury without express taxpayer approval, so long as the funds are not committed to a partisan cause or to favor a particular group of candidates. Compare *Machinists* v. *Street,* 367 U.S. 740; *Lathrop* v. *Donohue,* 367 U.S. 820. That some of those whose money is used disapprove of all the beneficiaries is no sounder an objection than that some taxpayers disapprove of a particular government spending objective. But, at all events, there can be no infirmity in a scheme that em-

ploys only funds voluntarily contributed for the purpose.

Of course, there were alternative solutions. It was suggested that the taxpayer be allowed to designate the party or candidate he wished to have receive his contribution. That scheme has obvious deficiencies, however: it excludes any independent candidate who becomes known only after the tax returns are filed; it freezes the subsidy of each beneficiary at an early date in the campaign; it compels voters to choose before they have heard much of the debate, and, under present practice, before the nominees of the major parties have been chosen; and it unnecessarily reveals to the government the citizen's political preference.

Nor is the "voucher" system advocated by Senator Metcalf (see Senator Metcalf's *amicus* brief, pp. 46–51, and Appellants' brief, pp. 151–152, 163) without its dangers. The potential for abuse, through coercive pressures on voucher holders and "black market" purchases at cut-rate prices, is evident enough. Again, unless the citizen is to hold back his voucher contribution until it is too late to help his candidate much, he will have committed himself without benefit of the campaign discussion.

But, at all events, the existence of other possible schemes does not invalidate the present congressional choice. The Constitution does not mandate a single solution: it only forbids some.

c. There is, in our view, no other First Amendment question with respect to the public financing provi-

sions of the challenged legislation. The suggestion that substituting public money for private contributions will estrange the Presidential candidate from his supporters, or the elected President from the citizenry at large, misses the mark. Of course, dependence on campaign donations, especially from moneyed interests, will end. But that is no loss. Nor is the link between the candidate and his audience severed: he must still win votes to gain election.

d. Of course, public funds cannot be allocated in a way that is intended to favor one candidate or political party or disadvantage any political aspirant. Government must be neutral. That concern has led to many provisions of law inhibiting "interference" by the government or its agents in political activity. See, *e.g.*, the Hatch Act, 5 U.S.C. 7324(a); 47 U.S.C. 326; 47 U.S.C. 398. The First Amendment would condemn any scheme that grossly discriminated on its face (*e.g., O'Brien* v. *Skinner,* 414 U.S. 524), or which invited such discrimination. See *e.g., Shuttlesworth* v. *Birmingham,* 394 U.S. 147. Because the charge of discrimination is in essence the same one advanced under the equal protection principle embodied in the Due Process Clause of the Fifth Amendment, we discuss it below (see Point III, *infra*).

4. Vagueness

Appellants contend (Br. 113–114, 213–215, 220–221) that certain provisions of the Federal Election Campaign Act Amendments are so imprecise or ambiguous as to require their invalidation for "vagueness," a

doctrine of special application when First Amendment rights are implicated.

The answer is supplied by *Civil Service Commission* v. *Letter Carriers, supra,* 413 U.S. at 568–581. There the Court was confronting the argument that the Hatch Act prohibition on government employees taking "an active part in political management or in political campaigns" was void for vagueness. To be sure, that broad generality was given more concrete content by congressional adoption in 1940 of prior Civil Service Commission rulings. But the Court recognized that, even so, it was necessary to evolve "a more refined definition of what conduct would or would not violate the statutory prohibition" and that it was entirely proper for Congress to leave that task to the Commission by a process that would continue "down through the years." *Id.* at 575. The Court also noted that "the Commission has established a procedure by which an employee in doubt about the validity of a proposed course of conduct may seek and obtain advice from the Commission and thereby remove any doubt there may be as to the meaning of the law, at least insofar as the Commission itself is concerned." *Id.* at 580, footnote omitted; see, also, *Federal Trade Commission* v. *Colgate-Palmolive Co.,* 380 U.S. 374, 394.

Those principles govern here. Congress expressly directed the Federal Election Commission to resolve ambiguities in the Campaign Act Amendments through rules and regulations (2 U.S.C. 438(a)(10))

and advisory opinions at the request of any federal office holder, candidate or political committee (2 U.S.C. 437f). There is thus no serious risk that any provision will remain unclear, except only insofar as "there are limitations in the English language with respect to being both specific and manageably brief." *Letter Carriers, supra,* 413 U.S. at 578–579.

Nor is there any cause to fear that clarifying interpretations will be so long delayed as to produce a substantial "chilling" of activity protected by the First Amendment in the meantime. An affected party can obtain a prompt ruling for his case by requesting an advisory opinion. Indeed, many requests for such opinions have already been submitted. See 40 Fed. Reg. 26660–26666, 28044–28045, 28944–28945, 30258–30259, and as of October 14, 1975, the Commission has issued more than 20 of them. See 40 Fed. Reg. 29792–29794, 31315–31317, 34084–34085, 36092–36094, 36242–36243, 36746–36747, 40673–40675, 42838–42840, 44040, 45292–45293, 45295–45296, 47691.

III

THE LEGISLATION DOES NOT INVIDIOUSLY DISCRIMINATE AGAINST CHALLENGERS OR CANDIDATES OF MINOR OR NEW PARTIES

Appellants contend (Br. 94–104, 127–138, 152–169) that the Federal Election Campaign Act Amendments invidiously discriminate against challengers to incumbents and against candidates of minor or new parties.

The first answer is that the challenge is essentially premature. So saying, we invoke no jurisdictional doc-

trines of "ripeness" or "prematurity." We mean only that, until an electoral campaign is held under the new rules, no one really knows precisely what their practical impact will be. It is impossible to predict with assurance who will be helped and who will be hurt. Accordingly, we urge that the Court should proceed cautiously in assessing the claim of discrimination.

Of course, it would be proper to entertain any claim that the new rules will inevitably grossly prejudice one group or another. But, to prove such a charge, appellants carry a heavy burden. Since the subject-matter is one with respect to which the Members of Congress are peculiarly knowledgeable, it is difficult to say that the law works gross injustice without thereby imputing improper motives to its framers.

What, then, are the main complaints? We can summarize them under two heads: (1) that the contribution, and especially the expenditure, ceilings grossly favor incumbents and major party candidates, and (2) that the public financing provisions for Presidential primaries and elections grossly favor the major party candidates.

A. THE CONTRIBUTION AND EXPENDITURE CEILINGS

By imposing contribution and expenditure limits, the Federal Election Campaign Act Amendments are said to discriminate against two groups: challengers and minor party or independent candidates. Although the situations often coincide, it is appropriate to treat the claims separately. We first look at the effect of the

new law insofar as it is alleged to entrench incumbents against primary challengers (usually major party candidates), and then consider the position of minor party and independent candidates.

1. Challengers

It is a well-known fact of American political life that, in most cases, the incumbent seeking reelection enjoys a substantial advantage over a new challenger. There are many reasons: the incumbent is usually the better known figure; he can claim the benefit of experience in the particular office; he has a longer opportunity to know his constituency and his constituents; he is in a better position to "make" news and thereby win free publicity; without serious check, he has the services of a staff paid with public funds; and, finally, he can use the franking privilege to communicate with his constituents during the campaign (but see 2 U.S.C. 439b).

If one looks at the history of the Presidency, the "momentum" of incumbency seems almost insurmountable. In this century, no sitting President who wanted it has ever failed to gain renomination by his party and, with only two very special exceptions,[10] he has won reelection as well. Congressmen and Sen-

[10] President Taft was defeated in 1912 when a faction of his party supported former President Roosevelt and Woodrow Wilson was elected with only 42 percent of the popular vote. Findings I, ¶ 75; J. App. 40. President Hoover was defeated by Franklin Roosevelt in 1932, the depth of the worst depression in the Nation's history. Findings I, ¶ 85; J. App. 41.

ators are somewhat less secure they can be defeated by age, scandal, apparent estrangement from their constituents, or simply by an irresistibly charismatic challenger. But the tradition remains that here, too, the incumbent is usually returned to office. Thus, only a total of 57 incumbents were defeated in the 1972 and 1974 elections. Findings IIA, ¶¶ 3–6; J. App. 269–394.

In the light of these realities (so much stressed by appellants, Br. 94–104, 127–129), one may wonder whether the new federal election campaign statutes can do any harm. The charge, however, is that the law aggravates the plight of challengers by preventing them, henceforth, from attempting to overcome their disadvantage by receiving larger contributions and spending more than incumbents. To impose the same ceilings on both incumbent and challenger, it is said, is to ensure that the former, with a big head start, will prevail.

The argument has a superficial logic. But there is a fundamental flaw: what is ignored is that, among the advantages incumbents usually enjoy, is a substantially greater ability to raise campaign funds, especially large contributions. Thus, if there were no limit on the size of contributions, and no ceiling on total expenditures, one would expect the threatened incumbent to be able to win the fund-raising contest and to outspend the challenger. Not surprisingly, that is precisely what actual experience shows.

Thus, in the two most recent congressional elections

of 1972 and 1974, incumbents on average outspent their major party opponents by nearly two to one (Findings IIA, ¶¶ 14, 24, 37, 45; J. App. 442, 444, 447–448, 449), and more than twice as many incumbents as challengers spent more than would be allowed by present law. Findings IIA, ¶¶ 18, 28, 40, 47; J. App. 442–443, 445, 448, 450. It is true that of the 57 races in 1972 in which incumbents were defeated, they were outspent in 34 instances. Findings IIA, ¶¶ 3–6, 20, 30, 42, 49; J. App. 269–394, 443, 445, 449, 450. But in all but 9 cases the successful challenger did not exceed the present spending limits. Findings IIA, ¶¶ 19, 20, 29, 30, 41, 42, 48, 49; J. App. 443, 445, 448–449, 450. The upshot is that the expenditure ceilings would apparently hurt incumbents as a class more than challengers as a class.

Nor is there any indication that the contribution ceilings now imposed will disadvantage challengers. In the 1974 congressional elections in which major party candidates challenged incumbents, a $1,000 limitation on individual contributions would have yielded for major party challengers almost exactly the same percentage (just over one-half) of the funds raised by incumbents, the latter losing substantially more dollars. See Findings IIA, ¶¶ 55, 57–58. J. App. 452, 453. With respect to the most recent Presidential election, the major party challengers, it seems, would have been relatively much better off. See Findings IIA, ¶ 74; J. App. 458.

The claim (Appellants' Br. 129–138) that challengers, unlike incumbents, have a special need to

raise "seed money" through large contributions is simply unproven. No doubt some challengers have received large donations at the start of a campaign, as have incumbents. But there is no evidence that this is necessary to a viable contest. Indeed, the experience of Ramsey Clark, who successfully raised more than $850,000 in contributions limited to $100 (see Findings I, ¶¶ 182, 185–186; J. App. 260, 261), suggests that a $1,000 limit will not seriously prejudice challengers.[11]

2. Minor party and independent candidates

The claim that the giving and spending limits imposed by the new law discriminate against minor party and independent candidates has even less foundation than the attack made on behalf of major party challengers. The bald fact is that only a single minor party or independent candidate in the 1972 and 1974 congressional elections exceeded the present spending limit. Findings IIA, ¶¶ 7, 19, 29, 41, 48; J. App. 395–422, 443, 445, 448–449, 450. And, of course, none came close to the ceiling in the most recent Presidential election. Finding IIA, ¶ 51; J. App. 451. When this is contrasted with the showing that 77 major party candidates for Congress in 1972 and 1974 spent

[11] Also indicative is the fact that, in the 1972 Presidential race, Senator McGovern accumulated some $24 million in contributions not exceeding $1,000. Findings IIA, ¶ 72; J. App. 457. And see the amounts raised as of the end of 1974 by 1976 Presidential candidates in contributions up to $1,000. Findings I, ¶ 196; J. App. 263–264.

more than the present law permits (Findings IIA, ¶¶ 18, 28, 40, 47; J. App. 442–443, 445, 448, 450) and that both major-party candidates for the Presidency did so in 1972 (Findings IIA, ¶ 71; J. App. 457), it is evident that minor party and independent candidates will be relatively better off under the expenditure limits fixed by the Federal Election Campaign Act Amendments.

Nor is there any indication that the new contributions limits will disadvantage those who do not represent a major party. On the contrary, it appears that in the 1972 Presidential elections minor party and independent candidates would have relatively benefitted from the new contributions ceilings (Findings IIA, ¶¶ 75; J. App. 458), and congressional candidates in 1974 would not have suffered. See Findings IIA, ¶¶ 59–60, 115; J. App. 453–454, 473–474.

Appellants have failed to demonstrate, as is their burden, that the challenged contributions and expenditure ceilings will invidiously discriminate against challengers or against minor party and independent candidates. To the contrary, those provisions are likely to reduce the present advantages enjoyed by incumbents and major party candidates by making it more difficult for entrenched office holders to overcome any serious challenge by raising more money and outspending their opponents. The net effect is to afford outsiders a better chance, even if still very unequal. That the balance is not fully redressed is no basis for a charge of discrimination.

that the legislation does not aggregate ex-

B. PUBLIC FUNDING OF PRESIDENTIAL ELECTIONS

The charge (Appellants' Br. 152–169) that the public funding provisions of the new law discriminate against minor and new parties and independent candidates is entirely conjectural, if not a little unreal, since no candidate not of a major party has remotely approached the Presidency since Theodore Roosevelt's "Bull Moose" defection. Once again, it is no ground for faulting the Campaign Act that it does not so radically change the status quo as fully to even the odds for the candidate of an entirely new party as against the nominees of the two traditional major parties. Our submission is that the new law helps new challengers. But, in answer to the appellants' charge, it is enough ~~that seek to restrict the number of candidates who~~ isting disparities.

We examine first the eligibility conditions for entitlement to any public funds, leaving to later consideration the allocation formulae.

1. Eligibility provisions

Although public funds are not made available to every would-be candidate for the Presidency, no matter how frivolous, that is as it should be. The Court has expressly approved various State election rules that seek to restrict the number of candidates who enter the lists, noting that "a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies." *Bullock* v. *Carter, supra,* 405 U.S. at 145. Beyond that, it has been recognized as proper to take measures to discourage "splintered parties and unre-

strained factionalism" (*Storer* v. *Brown,* 415 U.S. 724, 736), and "to prevent the clogging of [the] election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting." *Bullock* v. *Carter, supra,* 405 U.S. at 145.

If these interests may be served by denying a place on a ballot to those who do not first demonstrate substantial popular support, as the Court has repeatedly stated (*Williams* v. *Rhodes, supra,* 393 U.S. at 31–33; *Jenness* v. *Fortson,* 403 U.S. 431, 442; *Bullock* v. *Carter, supra,* 405 U.S. at 145; *Lubin* v. *Panish, supra,* 415 U.S. at 718–719; *Storer* v. *Brown, supra,* 415 U.S. at 736; *American Party of Texas* v. *White, supra,* 415 U.S. at 781), it must follow, *a fortiori,* that the same considerations will justify the lesser deterrent of withholding a public subsidy. Thus, the question is not whether it is permissible to restrict eligibility for public funds, but whether the mechanisms selected are too restrictive.

a. We begin with the Presidential primary matching fund scheme. Subject to the overall $10 million spending limitation [12] and to the availability of sufficient moneys in the Presidential Election Campaign Fund,[13] every eligible candidate who enters Presi-

[12] No candidate may receive public funds exceeding one-half the Presidential primary spending ceiling. 26 U.S.C. 9034(b).

[13] Matching payments for primaries have the last claim on the Fund (26 U.S.C. 9037(a)), and, in the event the Presidential Primary Matching Account is insufficient to satisfy all demands, the Secretary of the Treasury is directed to "seek to achieve an equitable distribution," taking into consideration the time priority of claims. 26 U.S.C. 9037(b).

dential primaries is entitled to a matching payment up to $250 for every private contribution he receives. No distinction is made between candidates: all must meet the same eligibility test and all receive funds according to the same formula.

Nor is qualification unduly restrictive. To be eligible, the candidate must raise $5,000 (counting only the first $250 of any contribution) in each of 20 States. That requires no more than 20 relatively modest contributions of $250 in as many States and a total campaign fund of $100,000. It is a test which any serious Presidential contender should be able to meet.

Matching payments are made only to those who are engaged in "seeking nomination by a political party for election to the office of President of the United States." 26 U.S.C. 9033(b)(2). But that is no more than a recognition that it is the expense of winning nomination that is being reimbursed in part out of public funds. Those who incur no such costs are properly excluded. There is no discrimination between aspirants, whether the party whose nomination is sought is established or new, major or minor. Nor is the term "political party" restrictive: although not defined in the Internal Revenue Code, it presumably embraces any "association, committee or organization" that sponsors a Presidential candidate. See 2 U.S.C. 431 (m); 18 U.S.C. 591(i). And it makes no difference by what method the party nominee is chosen, whether by

primary election, by convention, or by caucus. See 26 U.S.C. 9032(7).[14]

In sum, the matching fund scheme is as all-embracing as possible, more so than the law upheld in *American Party of Texas* v. *White, supra,* 415 U.S. at 791–794. At all events, this financing law is no "exclusionary mechanism." *Id.* at 794. It does not offend the equal protection principle of the Fifth Amendment.

b. The public financing of Presidential nominating conventions likewise involves no impermissible discrimination. Of course, only parties holding such conventions are eligible for the grant, but the new law in no way dictates which parties should follow that procedure. Compare *American Party of Texas* v. *White, supra.*

In order to receive funding for its convention an organization must be a party which has established a footing in the political arena by winning for its candidate in the previous Presidential election 5 percent of the votes cast. See 26 U.S.C. 9008(b), 9002(7). That, however, is well within the rule that public funds may properly be reserved for serious candidacy. As the Court has said, merely because government defrays some election expenses, it is not required also to "finance the efforts of every nascent political group

[14] Despite the title of the Act (see 26 U.S.C. 9031), the operative provisions of the matching payment statute nowhere require that nomination be by "primary" election. But, even if that be implied, the cited section defines "primary election" comprehensively, as we have indicated above.

* **." *American Party of Texas* v. *White, supra,* 415 U.S. at 794.

c. The most important aspect of public financing introduced by the new law is the provision for grants to the candidates at the general election for the Presidency. Appropriately, special efforts have been made here to avoid excluding any serious contender, while at the same guarding against encouragement of frivolous candidacy. A just compromise between those two objectives has been achieved.

There are two basic eligibility requirements. The first is that the candidate must show that he presumptively represents 5 percent of the voters. This condition can be satisfied in several ways. It is enough if the applicant is the nominee of a party whose candidate at the previous Presidential election received that percentage of the popular vote. 26 U.S.C. 9002 (6) and (7), 9004(a)(1) and (2)(A). Or the candidate himself may have achieved such a past record, in which event he qualifies notwithstanding that he may now be sponsored by a new party. 26 U.S.C. 9004(a) (2)(B). Or, finally, although neither the present candidate nor his party received the necessary votes at the last election, he will still be entitled to the subsidy if he now wins 5 percent of the popular vote. 26 U.S.C. 9004(a)(3). This is a fair attempt to afford every serious aspirant a share in the scheme, imposing only a reasonable test of past or current support.

There is a further requirement that the candidate must have his name (or that of electors pledged to

him) on the Presidential ballot in 10 States. 26 U.S.C. 9002(2)(B). This is to assure a national, and not merely local, appeal in those who receive public funds. Experience tells us that such a requirement will exclude no aspirant with any real prospect of success, considering that victory in the electoral college requires the votes of the 11 most populous States or 40 of the least populous. Findings I, ¶ 51; J. App. 26. Compare *Moore* v. *Ogilvie,* 394 U.S. 814.

The public financing provisions of the new law exclude no substantial Presidential contender. It remains only to answer the charge that, among eligible candidates, the apportionment of funds is discriminatory.

2. Allocation formulae

We have already noted that the primary matching payment scheme treats every eligible candidate identically. There are, however, different allocation formulae applicable to grants for nominating conventions and for the general election. Thus, "major" parties automatically receive a full subsidy for their conventions, as do their nominees, whereas other parties and candidates are only entitled to a pro rata share based on their performance at the previous or current election. This is said to be discriminatory.

It goes without saying that any demarcation line between "major", "minor" and "new" parties is necessarily a matter of judgment. There is, however, no present basis for faulting the particular percentage figures selected, assuming that some distinction is

proper. Our submission is that it was permissible to take account of the "obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other." *Jenness* v. *Fortson, supra,* 403 U.S. at 441. Of course, it would be improper to use public financing to assure "a complete monopoly" to "two particular parties" (*Williams* v. *Rhodes, supra,* 393 U.S. at 32). But, as long as the status quo is not frozen, there is no objection to "encourag[ing] compromise and political stability" (*id.* at 31–32) by incentives to relatively unified large political parties. See *Jenness* v. *Fortson, supra,* 403 U.S. at 439–440. That is what the law does.

The public financing provisions are carefully designed to enable any party to win "major" party status. First, the boundary line is fixed relatively low—at 25 percent of the votes cast—and no distinction is made above that level. Second, the formula for grants to minor and new parties relates to the average of the votes received by the major party candidates—not those received by the winner—with the effect of increasing financing for lesser candidates. Third, the grants for minor candidates are strictly proportional to votes received, thereby reflecting the growth of those parties. Finally, while the initial allocation of funds is made on the basis of past performance, changes in support are recognized by providing additional grants (or first grants in the case of new parties) on the basis of current performance. The

statutory scheme, without wasting public money and unduly encouraging factionalism, effectively reflects and respects the "potential fluidity of American political life" (*Jenness* v. *Fortson, supra,* 403 U.S. at 439).

Ideally, it would be preferable to give all candidates their share of public funds before the election. That is done with respect to the nominees of all parties which have a proven record, as well as candidates who have personally achieved the required vote in the most recent election. But, unless every claimant, no matter how frivolous, is to be given $20 million for the asking, there must be a formula that tests the seriousness of candidates, and, for those who have not run before and who represent new parties, the first available record is the current election.

It is a disadvantage for them to have to borrow and receive reimbursement only if they demonstrate their support at the election. Yet that is the best that can be done, and the Constitution does not require the impossible. It would not be reasonable to deny everyone else, of proven record, his share during the obviously appropriate pre-election period simply to avoid this disparity. That would indeed be allowing the tail to wag the dog.

The general election financing scheme is imperfect only insofar as is unavoidable. On the whole, it reaches a fair accommodation. There is no invidious discrimination here.

CONCLUSION

The judgments of the court of appeals and of the district court should be affirmed.

Respectfully submitted.

EDWARD H. LEVI,
Attorney General.
ROBERT H. BORK,
Solicitor General.
DANIEL M. FRIEDMAN,
Deputy Solicitor General.
LOUIS F. CLAIBORNE,
Special Assistant to the Solicitor General.

OCTOBER 1975.

U.S. GOVERNMENT PRINTING OFFICE: 1976